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No. 88-6222

Supreme Court, U.S.

FILED

MAY 26 1989

JOSEPH F. SPANGL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

SCOTT WAYNE BLYSTONE,  
*Petitioner,*

v.

PENNSYLVANIA,  
*Respondent.*

On Writ of Certiorari to the  
Supreme Court of Pennsylvania

**JOINT APPENDIX**

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PETITION FOR CERTIORARI FILED DECEMBER 16, 1988  
CERTIORARI GRANTED MARCH 27, 1989

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**CHRONOLOGICAL LIST OF  
RELEVANT DOCKET ENTRIES**

February 13, 1984—Criminal information filed.

June 13, 1984—Verdict of guilty of first degree murder returned by jury.

June 13, 1984—Verdict of sentence of death returned by the jury.

April 17, 1986—Defendant formally sentenced by Judge Fred C. Adams of the Court of Common Pleas of Fayette County, Pennsylvania.

October 17, 1988—Opinion and Judgment of the Supreme Court of Pennsylvania affirming the Petitioner's conviction and sentence of death.

IN THE COURT OF COMMON PLEAS  
OF FAYETTE COUNTY PENNSYLVANIA

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No. 2 of 1984  
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COMMONWEALTH

v.

SCOTT WAYNE BLYSTONE

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JUDGE ADAMS: We would address this to the foreman of the jury, Mr. Paul Davis: You have heard the verdicts read in this case. As they were read are they the verdicts which you entered upon the verdict slips and which you signed as foreman?

MR. PAUL DAVIS, FOREMAN: Yes, sir.

JUDGE ADAMS: Very well. Members of the Jury, you need not stand as you respond. The Clerk will poll the jury. As each of your names are called and each offense is read, you are to respond how you voted, whether it be guilty or not guilty. You may poll the jury.

ALL TWELVE JURORS WERE POLLED AND EACH JUROR ANSWERED "GUILTY" TO EACH CHARGE AS READ BY THE CLERK.

CLERK: And so say you all.

JUDGE ADAMS: Members of the Jury, where you have made a finding of murder in the first degree, it is necessary that the Court now have a second hearing in which testimony will be offered, following which you need to determine the penalty to be imposed in this case, whether it be life in prison or death by execution. The

second hearing will have nothing to do with the question of innocence or guilt. That has been determined, but in homicide cases of the first degree, that is the only type of case where the jury determines what the penalty will be. As I told you, it will be either life in prison or death. Before we start this hearing, I am going to excuse you for lunch and ask you that during your lunch period you are not to discuss the case in any manner. Wait until you have heard the second testimony and I have charged you concerning the imposition of the penalty. At that time you are to decide, on the circumstances as you find them to be, what penalty should be imposed. We would excuse you for lunch at this time. Counsel is to remain.

JURORS LEAVE COURTROOM

JUDGE ADAMS: I would like to see counsel in chambers please.

CONFERENCE IN CHAMBERS OFF THE RECORD.

6/13/84—1:45 p.m.

THE FOLLOWING TOOK PLACE IN THE ABSENCE OF THE JURY:

MR. WHITEKO: Your Honor, after lengthy discussions with Mr. Blystone and over my strenuous objection, he states that he wishes to offer no evidence. I have talked to his parents and interviewed them on several occasions and I wish to put them on the stand and I wish to put Mr. Blystone on the stand, but after trying for two hours there has been no progress.

JUDGE ADAMS: Mr. Blystone, by virtue of the statement of your attorney, it is necessary that I explain to you what is involved here to make sure that you fully understand all of your rights and the effect of the decision you have made. Once the jury has made a determination of innocence or guilt and found you guilty of first degree, this is the only occasion in our law in Pennsylvania where the jury determines the penalty. The jury would have to determine whether your penalty would be life imprisonment for the homicide or death by the elec-

tric chlar. I would have to instruct them that if they find an aggravating circumstance and no mitigating circumstances, they must impose the death penalty. I would also have to tell them that if they found the homicide occurred during the commission of the felony of robbery, that is an aggravating circumstance, and if they believed beyond a reasonable doubt that this death occurred during a robbery, that would be aggravating and they must impose the death penalty unless the defense would come forth with what are called mitigating circumstances. Mitigating circumstances would be, under our law, that you had no significant history of prior criminal convictions, that you were under the influence of extreme mental or emotional disturbance, that your capacity to appreciate the criminality of your conduct or to conform your conduct to the requirements of law was substantially impaired, your age, that you acted under extreme duress or under the substantial domination of another person, that the victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts, that your participation was relatively minor, or any other mitigating matter concerning your character or record or the circumstances of this offense. As the Commonwealth has the burden of proving beyond a reasonable doubt the aggravating circumstances, the defense has the burden of proving the mitigating circumstances, and that burden of proof is by what is called a preponderance of the evidence. Your burden of establishing mitigating circumstances is not as great as that of the Commonwealth. To establish mitigating circumstances you must prove them by a fair preponderance, which is simply that the evidence on one side is greater than the evidence on the other; that is, it is more believable on the one side than the other. If you do not present any testimony, then your attorney would have to rely entirely upon the evidence which is presently before the jury and then argue to the jury whether or not they should impose the death penalty. You have an absolute right to remain silent and I

cannot require you to testify nor can I require you to put any witnesses on the stand to testify on your behalf, but I would strongly ask you to consider the effect of your failure to offer any testimony. You have to decide whether the testimony that was offered here would affect the outcome of this case—whether it would be favorable or unfavorable to you. I will tell the jury they should not consider the fact that you did not testify or that you did not offer any evidence in mitigation and that their verdict cannot be based on that fact, but if you do not give the many evidence then you give them very little to consider from the standpoint of mitigation. Your decision here will be absolutely final and if you elect not to offer any testimony and they would return the death penalty, you will not be entitled to a new trial or a reconsideration of the death penalty based on the fact that you did not offer any testimony. You are represented by counsel, and your counsel has stated that he has strongly recommended to you that you do offer testimony in whatever nature he sees fit or you see fit, but as I stated, the decision has to be yours. Your counsel can recommend but he cannot require you to offer testimony. I would ask you, Mr. Blystone, do you understand what I have explained to you?

MR. BLYSTONE: Could I have a minute, your Honor?

JUDGE ADAMS: I am sorry—I didn't hear you.

MR. BLYSTONE: Could I have a minute to talk to my lawyer?

JUDGE ADAMS: I can't hear you.

MR. WHITEKO: He wishes to speak to me now, your Honor.

JUDGE ADAMS: Fine. You may do so.

MR. BLYSTONE CONFERS WITH COUNSEL.

MR. WHITEKO: Your Honor, one question he has—when you stated "appeal on the death penalty," he wants to know if he loses all his rights, and I have explained to him that he doesn't.

JUDGE ADAMS: He does not. The only thing is, you would not have the right to appeal on the grounds that you had no opportunity to offer testimony. You would have the right to appeal that there was no basis for the imposition of the death penalty based on what was before the jury because you have no burden to go forth to prove anything, even during this proceeding, except mitigating circumstances, so the Commonwealth would still have the burden of proving the existence of aggravating circumstances even if the jury found that there were no mitigating circumstances. What I am saying is, your offering testimony or not offering testimony does not lessen the Commonwealth's burden to prove aggravating circumstances beyond a reasonable doubt. The imposition of the penalty, based on whether you testify or not, would have—I am sorry, whether you testified or not would have nothing to do with your right to take an appeal from the conviction of first degree murder or whatever imposition the jury might make. I am simply stating to you that the Court is giving you the opportunity to present whatever evidence you wish in mitigation of the sentence. If you fail to accept that opportunity and you do not offer any testimony, you could not later appeal on the basis that you did not offer any testimony or were not given the opportunity to do so. Does that answer the question for you?

MR. BLYSTONE: Yes, I understand.

JUDGE ADAMS: Do you have any other questions of me?

MR. BLYSTONE: No, your Honor.

JUDGE ADAMS: Do you wish to testify yourself or to have your parents testify or to offer any other evidence in this case? You had better think very carefully before you answer that question. I would tell you that I am not insisting that you testify—don't misunderstand me—because whatever decision you make I am going to abide by, but I just want to make sure that you fully understand what you are doing because tomorrow you

cannot change your mind. I would ask you to consult one more time with your attorney and then after consulting, tell me what you want to do and we will respect your wishes.

MR. BLYSTONE CONFERS WITH COUNSEL

JUDGE ADAMS: What is your decision, Mr. Blystone?

MR. BLYSTONE: I have no testimony and no witnesses.

JUDGE ADAMS: Either through yourself or anyone else?

MR. BLYSTONE: No.

JUDGE ADAMS: May I see counsel at sidebar please?

SIDEBAR CONFERENCE OFF THE RECORD.

JUDGE ADAMS: Let the record indicate that the Court has interrogated the defendant, Scott Wayne Blystone, and the Court is of the opinion that he is an intelligent man who understands what I have explained to him, and that the decision he has made was made after careful consideration. I have consulted with his counsel who is also of the opinion that he understands the decision he has made and that he understands the possible consequences of that decision. Is that correct, Mr. Whiteko?

MR. WHITEKO: Yes, your Honor. I have tried to explain to him that I wish for him to take the stand, or his parents, and explained the consequences and he has refused.

JUDGE ADAMS: And you have advised him that he should, is that correct?

MR. WHITEKO: Yes, I have.

JUDGE ADAMS: Very well. Mr. Whiteko has asked for some additional time before proceeding, so we will adjourn and reconvene at 2:30. Anne, please advise the jury that we will not start until 2:30.

6/13/84—2:30 p.m.

THE FOLLOWING TOOK PLACE IN THE ABSENCE OF THE JURY:

JUDGE ADAMS: Mr. Whiteko, there are several more questions I feel I must direct to the defendant before we call in the jury. Mr. Blystone, are you taking any narcotic or medication of any kind that might affect your reasoning?

MR. BLYSTONE: No, I am not.

JUDGE ADAMS: Can you state for the record why it is that you do not want to offer any testimony?

MR. BLYSTONE: I don't want anybody brought into it.

JUDGE ADAMS: I am sorry—I can't hear you.

MR. BLYSTONE: I don't want anybody else brought into it.

JUDGE ADAMS: What did he say?

MR. WHITEKO: He doesn't want anybody else brought into this matter, your Honor.

JUDGE ADAMS: Is that your only reason for not offering any testimony?

DEFENDANT SHAKES HIS HEAD "YES."

JUDGE ADAMS: Of course, if you testify yourself that would not be bringing anyone into it except yourself, do you understand?

MR. BLYSTONE: Uh-huh.

JUDGE ADAMS: Very well. Would counsel approach the bench please.

SIDEBAR CONFERENCE OFF THE RECORD.

JUDGE ADAMS: You may bring in the jury.

THE FOLLOWING TOOK PLACE IN THE PRESENCE OF THE JURY:

JUDGE ADAMS: Members of the Jury, you have found the defendant guilty of murder in the first degree and your verdict has been so recorded. We are now going to hold a sentencing hearing during which counsel may present additional evidence and arguments and then you will decide whether the defendant is to be sentenced to

death or life imprisonment. Whether you sentence the defendant to death or to life imprisonment will depend upon what, if any, aggravating or mitigating circumstances there are in this case. Generally speaking, aggravating and mitigating circumstances are circumstances concerning the killing and the killer which makes a first degree murder case either more serious or less serious. The Crimes Code defines more precisely what constitutes aggravating and mitigating circumstances. I will give you detailed instructions later in this hearing as to what constitutes an aggravating circumstance and what constitutes a mitigating circumstance, but we would tell you at this time that aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt as I explained reasonable doubt to you during the charge. While mitigating circumstances must be proven by the defendant, the burden of proof is of a lesser degree. It is only by a fair preponderance or by a preponderance of the evidence, which simply means that it exceeds in weight. Is the Commonwealth prepared to proceed?

MR. SOLOMON: If the Court please, the Commonwealth is prepared to present testimony regarding the aggravating circumstance that the defendant committed a killing while in the perpetration of a felony, and the felony would be robbery that was committed on Dalton Charles Smithburger. If the Commonwealth were to call witnesses, the Commonwealth would call Barbara Clark, Jackie Guthrie, Miles Miller, and Trooper Teagarden to play the tape of the conversation between Miles Miller and Scott Blystone. Since that testimony has already presented to this jury, to present the same testimony would merely be a reiteration of that testimony. The Commonwealth would rely upon the recollection of the jury regarding that testimony and they would not need to carry any further witnesses at this time, your Honor.

JUDGE ADAMS: Very well. Does the defense wish to offer any evidence or testimony?

MR. WHITEKO: Your Honor, we don't wish to offer any additional testimony at this time?

JUDGE ADAMS: Is that your decision, Mr. Blystone?

MR. BLYSTONE: Yes, it is.

JUDGE ADAMS: Mr. Whiteko, it is my understanding that you are not offering any testimony either from the defendant or from anyone else, is that correct?

MR. WHITEKO: Yes, your Honor, that is correct.

JUDGE ADAMS: Members of the Jury, as I told you earlier, the defendant has an absolute right during the trial of this case to remain silent. He has no duty to offer testimony during the trial of the case. He also has that same right during a sentencing hearing such as we have here. He has an absolute right not to offer any testimony either through himself personally or through other witnesses. The same standard that I told you applied in the trial of this case also applies in the sentencing aspect of this case. The fact that the defendant elects not to offer any testimony is not of itself any indication of the penalty you might wish to impose. The Commonwealth still has the burden of proving the aggravating circumstance beyond a reasonable doubt whether he offers anything or not. You would also have the obligation, even though no testimony is offered during this proceeding, to determine from all of the testimony—that is, what you heard during the trial of the case—whether or not there are aggravating circumstances or whether or not there are mitigating circumstances. Is there anything which counsel for the Commonwealth would wish to present to the jury before argument on the penalty?

MR. SOLOMON: No, your Honor, thank you.

JUDGE ADAMS: Is there anything further which the defense would wish to present before argument to the jury on the penalty?

MR. WHITEKO: No, your Honor.

JUDGE ADAMS: We would first hear from the Commonwealth.

MR. SOLOMON: Thank you, your Honor.

ARGUMENT BY MR. SOLOMON.

JUDGE ADAMS: Mr. Whiteko.

ARGUMENT BY MR. WHITEKO.

JUDGE ADAMS: Members of the Jury, the Court will now instruct you as to the standard you are to apply in reaching your determination. As I told you earlier, you may consider all the testimony that you heard. You may consider anything that you heard or found believable in the first trial. During that period of time you heard testimony concerning the commission of a robbery. You made a finding of guilty on that charge. You made a finding of guilty on the charge of criminal homicide. If you find that the killing occurred in the commission of that robbery, that is an aggravating circumstance. You would need to find beyond a reasonable doubt that the killing occurred in the perpetration of that robbery. If you so find, that would be an aggravating circumstance. The Crimes Code defines what are aggravating and mitigating circumstances,—for example, the victim was a fireman, police officer or public servant concerned in official detention who was killed in the performance of his duties. Of course, that is not applicable here so I am not going to give you the aggravating circumstances that are not applicable—only that which is, and there is only one aggravating circumstance that you find, and that is that the killing occurred in the commission of the felony or robbery, if you find this occurred beyond a reasonable doubt. If you find that there is an aggravating circumstance, and you must unanimously find it, you would then need to determine if there were any mitigating circumstances, which I will explain to you. If you find an aggravating circumstance and no mitigating circumstances, it is your duty to return a verdict of death. If you find that there are mitigating

circumstances, then you would need to determine whether the aggravating circumstance or aggravating circumstances that you found outweigh the mitigating circumstances; that is, in balancing the two, if the aggravation of this killing outweighed the mitigation, you must return the death penalty. If you find no aggravating circumstances, you must return the penalty of life imprisonment, or if you find that the mitigating circumstances outweigh the aggravating circumstances, you must return life imprisonment. The Crimes Code provides that the following matters, if proven, constitute mitigating circumstances. I am going to read to you everything under the Crimes Code that you might consider as a mitigating circumstance. In order to consider them, you would have to find evidence that would justify the finding of mitigating circumstances. As I said to you, that finding of mitigating is not the same standard. It is just if you find that the evidence of mitigation is greater than the other way by a preponderance of the evidence, which means simply to exceed in weight, and then you would make a finding of mitigating. These are the things you could consider, but I stress to you that you cannot consider them unless there is some evidence that relates to them. One is that the defendant has no significant history of prior criminal convictions. Also, that the defendant was under the influence of extreme mental or emotional disturbance; the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; the youth or advanced age of the defendant at the time of the crime; the defendant acted under extreme duress or acted under the substantial domination of another person; the victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts; the defendant's participation in the homicidal act was relatively minor; and any other mitigating matter concerning the character or record of

the defendant, or the circumstances of his offense. I am going to repeat those to you, and as I told you, they are only applicable if proven by a fair preponderance of the evidence: The defendant had no significant history of prior criminal convictions; the defendant was under the influence of extreme mental or emotional disturbance; the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; the youth or advanced age of the defendant at the time of the crime; whether the defendant acted under extreme duress or acted under the substantial domination of another person; the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act; the defendant's participation in the homicidal act was relatively minor, and any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense. If any of you would want any further instructions as to what constitutes aggravating circumstances or mitigating circumstances, raise your hand. (no response). As I told you, the Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. The defendant has the burden of proving mitigating circumstances but only by a preponderance of the evidence. All of the evidence from both sides, including the evidence you heard earlier during the trial in chief as to aggravating or mitigating circumstances, is important and proper for you to consider. You should not decide out of any feeling of vengeance or prejudice toward the defendant. As I told you earlier, which I am going to stress again, that it is entirely up to the defendant whether to testify or to offer any evidence, and you must not draw any adverse inference from his silence or the fact that he elected not to present any evidence. The verdict is for you, Members of the Jury, to decide. Remember and consider all of the evidence, giving it the weight to which

it is entitled. I want you to understand that you are not merely recommending a punishment. The verdict you return will actually fix the punishment at death or life imprisonment. Your verdict must be unanimous. It cannot be reached by a majority vote or by any percentage. In order for you to return a verdict of death, all twelve of you must unanimously agree upon that verdict. Your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstances, or if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases your verdict must be a sentence of life imprisonment. You will be given a special verdict slip applicable to this decision you need to make. It will differ from the verdict slip which I previously gave to you. Under the first paragraph it reads: "We, the jury, unanimously sentence the defendant to . . ."—there is typed the word "death" or the words "life imprisonment." Depending upon the determination you make, you will enter a checkmark opposite "death" or opposite "life imprisonment." If you find "life imprisonment" you need go no further with your verdict slip. Have the foreman that you select sign the verdict slip and return it to the Courtroom. If you find the death penalty is to be imposed, you would need to go to the second paragraph which says: "We, the jury, have found unanimously at least one aggravating circumstance and no mitigating circumstances." If you would find that to be the case, you would have checked the death penalty on number one and you would have checked in the space opposite what I just read you under paragraph two. If you find that there are aggravating circumstances and also mitigating circumstances, you would then go to the next paragraph which says: "We, the jury, have found unanimously one or more aggravating circumstances which outweigh any mitigating circumstances." Repeating what you would do—you would

first make the determination of whether the sentence is death or life imprisonment. If you decide it is life imprisonment, you would go no further. Just simply have the foreman sign the verdict slip and return to the Courtroom. If you find that death is to be imposed, then you would need to show whether you found aggravating circumstances and no mitigating circumstances. That would be paragraph two. If you found an aggravating circumstance and no mitigating, you go no further. Just check that block and sign it. If you find that there were both aggravating and mitigating, you would not check the second block but go to the third and check that the aggravating circumstances outweigh the mitigating. I told you on the other verdict slips that you were to make no comment on the verdict slips except the finding of guilty or not guilty. That is not the case on this verdict slip. If you find that there is an aggravating circumstance, you would write on the verdict slip what that aggravating circumstance was. In this case there is only one aggravating circumstance that you could find and that is that the death occurred in the commission of a robbery. If you find beyond a reasonable doubt that that is an aggravating circumstance which would outweigh the mitigating, then you would write that on the verdict slip. Does any juror wish any further explanation on how you would deal with the verdict slip? (no response). I think when you read it that it will be self-explanatory, at least I hope that it will, but I would stress to you that you must write on it, that is the foreman must write on it what the aggravating circumstance you found was. As I stated to you, your verdict must be unanimous in this case to impose the death penalty. If, after conscientious and thorough deliberations, you are unable to agree on your findings and verdict, you should report that to the Court. If in my opinion further deliberations would not result in a unanimous agreement of the sentence, it would be my duty then to sentence the defendant to life

imprisonment. What I am telling you, if you do not unanimously agree on the death penalty, then the sentence imposed would be that of life imprisonment. Would counsel for the Commonwealth wish any additional correction or clarification of the charge?

MR. SOLOMON: No, your Honor, thank you.

JUDGE ADAMS: Would the defense?

MR. WHITEKO: No, your Honor.

JUDGE ADAMS: Does any Member of the Jury wish any additional clarification of the charge or the verdict slip? (no response). Members of the Jury, you have one of the most solemn duties ever to be imposed on anyone. You must sit in judgment of a person and determine whether they should be sentenced to life or death. You have a sworn duty to take the law as the Court gives it to you and follow that duty in accordance with the instructions I have given you. You may now retire and consider your verdict.

JURY RETIRED AT 3:10 p.m.

AT 3:46 p.m. the jury returned to the Courtroom with a question, and the colloquy is as follows:

JUDGE ADAMS: Mr. Foreman, do you have a question?

FOREMAN OF THE JURY: We would like you to repeat what constitutes a mitigating circumstance.

JUDGE ADAMS: All right. The Legislature has determined what constitutes mitigating circumstances. I am going to read to you those things that you could consider but you are only to consider them if there is evidence that would cause you to believe that they exist. For purposes of this case, the following matters, if proven, can constitute mitigating circumstances: The defendant has no significant history of prior criminal convictions; the defendant was under the influence of extreme mental or emotional disturbance; the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; the youth or ad-

vanced age of the defendant at the time of the crime; whether the defendant acted under duress, extreme duress, or acted under the substantial domination of another person—now, this would be duress from some other source; the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act; the defendant's participation in the homicidal act was relatively minor; and the last catch-all—any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense. The first seven are the specific matters you could consider. The last is the catch-all—any other mitigating circumstances that result from the character or record of the defendant or the circumstances of the case. It would be your duty to consider these types of mitigating circumstances and if there is evidence from which you can make a finding that they existed, you would consider them but if there is no evidence concerning them at all, of course there is then nothing for you to consider in determining whether or not that is a mitigating circumstance. Mr. Foreman, as far as you are concerned, do you think that answers your question personally?

FOREMAN: Yes.

JUDGE ADAMS: Now, does any other Member of the Jury have any question concerning aggravating or mitigating?

JUROR: The last line—any other mitigating circumstances. Would you explain that.

JUDGE ADAMS: It states "any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense." This is pretty broad and allows you a great latitude in determining what you might consider to be a mitigating circumstance, but it should be, in determining it, something that you can draw from the record of this case as to his character or the record of the defendant or the circumstances of his offense. If you find anything in these that you consider to be mitigating, you might consider them, and

then you would weigh whatever you found to be mitigating against whatever you found to be aggravating, if you found aggravating. If the mitigating outweighs the aggravating, it must be life imprisonment. If the aggravating outweighs the mitigating, then it must be death. Does that answer your question?

JUROR: Yes, sir.

JUDGE ADAMS: Does any other juror have any other question?

NO RESPONSE

JUDGE ADAMS: Does the Commonwealth wish me to make any further instruction or clarification?

MR. SOLOMON: No, your Honor, thank you.

JUDGE ADAMS: Would the defense?

MR. WHITEKO: No, your Honor.

JUDGE ADAMS: Very well. You may retire and continue your deliberations.

JURY RETIRED AT 3:50 p.m.

6/14/84—10:00 a.m.

The following took place in Courtroom number 1 in the presence of Judge Adams, Mr. Solomon, Mr. Whiteko, Scott Wayne Blystone, Wanda Budner of the Clerk of Court's Office, and the court reporter:

JUDGE ADAMS: It was called to the Court's attention after the jury had been discharged that inadvertently the stenographer was not in the Courtroom to record the taking of the verdict of sentence nor was the stenographer present when I gave the defendant his rights, so it is going to be necessary that I repeat the rights so they are on the record and that we establish on the record what took place yesterday. We would at this time ask the clerk for the record to state her name and her occupation.

MRS. BUDNER: My name is Wanda Budner and I am a clerk in the Clerk of Court's Office.

JUDGE ADAMS: Were you the clerk that took the verdict of sentence following the conviction of the first degree homicide as determined by the jury?

MRS. BUDNER: Yes, I was.

JUDGE ADAMS: For the record will you read what that verdict was.

MRS. BUDNER: We, the jury, unanimously sentence the defendant to death. We, the jury, have found unanimously at least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance—death resulted during commission of a robbery.

JUDGE ADAMS: Was this verdict read in open court?

MRS. BUDNER: Yes, sir, it was.

JUDGE ADAMS: Following its reading in open court—first, what was the name of the foreman of the jury?

MRS. BUDNER: Paul Davis.

JUDGE ADAMS: Did Paul Davis state in open court that the verdict as recorded was the verdict as he entered it on the verdict slip and signed it?

MRS. BUDNER: Yes, he did.

JUDGE ADAMS: Following that was the jury polled?

MRS. BUDNER: Yes, it was.

JUDGE ADAMS: And as a result of the poll what did the jury—what was the result of the poll?

MRS. BUDNER: It was affirmative.

JUDGE ADAMS: By all jurors?

MRS. BUDNER: By all jurors.

JUDGE ADAMS: Thank you. Mr. Solomon, you have heard the statement of the Clerk as to what took place at that proceeding. Were you present during the time that the sentencing verdict was read?

MR. SOLOMON: I was, your Honor.

JUDGE ADAMS: And as stated by the Clerk, do you recall it in that fashion?

MR. SOLOMON: Your Honor, I recall the verdict being read by the Clerk, I recall your Honor asking the

foreman of the jury, Mr. Davis, as to whether or not the verdict as read was as he recorded it and he answered in the affirmative. I then recall the Court instructing the Clerk to poll the jury, at which point the jurors were polled individually by the Clerk and each answered in the affirmative that the verdict as read was as they voted.

JUDGE ADAMS: Mr. Whiteko, do you have any different recollection?

MR. WHITEKO: No, your Honor.

JUDGE ADAMS: As stated here, as far as you are concerned, was this what happened yesterday?

MR. WHITEKO: Yes, your Honor.

JUDGE ADAMS: Mr. Blystone, do you have any different recollection as to what occurred?

MR. BLYSTONE: No, your Honor.

JUDGE ADAMS: Mr. Blystone, I have to give you your rights again even though I did give them to you once, so that they will be on the record. The Court wishes to advise you that where you have been found guilty by a jury with regard to the charge of robbery, conspiracy to commit homicide, conspiracy to commit robbery, and murder in the first degree, that you have a right to file a motion for arrest of judgment within ten days of the date of the verdict on grounds of error appearing on the face of the record or that the evidence is insufficient to sustain the charge or that the Court does not have jurisdiction. If the Court should rule favorably on such motion, the charge would be dismissed and you would be discharged. You have a right to file a motion for a new trial within ten days of the date of the verdict on grounds of trial errors prejudicial to you, or that the verdict was against the weight of the evidence, or for such other reason as you may have. If the Court would rule favorably on such motion a new trial will be granted. If the Court should refuse your motion for arrest of judgment or motion for new trial, you have a right to appeal to a Higher Court on any issues raised by such motions. We wish to advise you, however, that the

Higher Court will not consider any issue that is not raised by your motion for new trial or motion for arrest of judgment. If the Higher Court should rule favorably on your motions, you would either be discharged or granted a new trial, as the case may be. You are represented by Mr. Whiteko of the Public Defender's Office who will assist you in preparing any motions you wish to file. You of course have the right to private counsel if you can afford the services of private counsel. The Court appointed counsel, that is the Public Defender, will continue to serve and represent you free of charge, not only with respect to the filing of the motions but all proceedings, including appeal to the Higher Court on any issues raised by such motions. Any action you desire to take with regard to filing any motions should be done immediately and in any event must be done within ten days of the date of the verdict. If such motions are not filed or are filed and voluntarily withdrawn by you as they relate to the charges of robbery, conspiracy to commit robbery, and conspiracy to commit criminal homicide, the legal effect would be that the verdicts would stand and you would be waiving, that is giving up, your right to file such motions and appealed to a Higher Court. On the issue of the imposition of the death penalty, you have an automatic right to appeal to the Supreme Court. This Court is not urging or discouraging the filing of any such motions by you, nor is the Court indicating how it would rule on any such motions. The Court is merely advising you of your legal rights. Do you understand, Mr. Blystone, what I have explained to you?

MR. BLYSTONE: Yes, I do.

JUDGE ADAMS: Do you have any question of me at all?

MR. BLYSTONE: No, your Honor.

JUDGE ADAMS: Very well. This Court is adjourned.

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IN THE COURT OF COMMON PLEAS  
OF FAYETTE COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

(Title Omitted in Printing)

CLOSING ARGUMENTS OF GERALD R. SOLOMON AND  
JEFFREY W. WHITEKO WITH REGARD TO THE  
PENALTY TO BE IMPOSED BY THE JURY AFTER THE  
JURY HAD RETURNED A FIRST DEGREE VERDICT

6/13/84

[1] MR. SOLOMON: May it please this most Honorable Court, Mr. Whiteko, and Ladies and Gentlemen of the Jury. As Members of this Jury and having found the defendant guilty of murder in the first degree, you now face a solemn and serious decision, whether the defendant shall receive life in prison or shall receive the death penalty. If anyone thinks that I enjoy, or the Commonwealth enjoys coming before you and asking for the death penalty, they have another thought coming. It is much, much easier to represent the Commonwealth in a non-capital, non-serious case, but it is my duty, as the District Attorney of Fayette County, to come before you and to represent the Commonwealth to the best of my ability, and it is your duty as jurors, your sworn duty, to follow the law and to apply that law to this case. You did that earlier in returning your verdict and I am sure you will do it when you retire to deliberate the penalty. As before, you must follow the law as his Honor, Judge Adams, will give it to you to determine what the penalty should be. Our law doesn't permit the jury to impose the death penalty or impose a life sentence as they feel it should be, but rather there are certain specific times

when the death penalty should be imposed and there are certain specific times when it should not be imposed. The court touched upon it and told you of aggravating and mitigating circumstances. The aggravating circumstance in this case is that this defendant committed a felony—excuse me—committed a killing in the perpetration of a felony. The felony in this case was the robbery. You have already made a determination by your verdict that this defendant [2] was guilty of that robbery, so you have the aggravating circumstance. It is already proven and you already believed it. Under the law, if you have an aggravating circumstance and no mitigating circumstances, it is your duty to impose the death penalty, or if you have an aggravating circumstance and it outweighs any mitigating circumstances you may find, it is your duty to impose the death penalty; so each of you were asked last week when we questioned you whether or not, under the appropriate circumstances, you could impose the death penalty and each of you replied that you could. Each of you replied that you would follow the law, and each of you replied that whatever your duty was, you would follow it. The Commonwealth would admit to you that somewhere—somewhere in his life this defendant, for whatever reason, decided that human life wasn't very valuable, decided that taking a human life was like any other act. People pray at night—you wish during your life that you will live to a ripe old age and die a peaceful death—a nice, peaceful death—and the thought of having six shots fired in the back of your head is something that none of us want to think about. Animals—lowly animals—fight desperately for their lives. No one wants to throw away life. Somewhere in his life, Scott Blystone decided that human life has no more value than \$13.00. I would ask that each of you listen closely to the instructions the Court gives you. There is no doubt that there is an aggravating circumstance that is present. You must determine from the evidence presented in this Courtroom whether or not

there are any mitigating circumstances; if not, you must follow the law and impose the death penalty. Once again, as in [3] the initial proceedings where you determined guilt or innocence, you cannot be guided by sympathy for the defendant or the victim. You must follow the law and I am confident that you will. Thank you very much.

JUDGE ADAMS: Mr. Whiteko.

MR. WHITEKO: Judge Adams, Mr. Solomon, Trooper Goodwin—Ladies and Gentlemen of the Jury, good afternoon. I spent a troubled evening last night thinking about the possibility of this going to this stage, and I was going to argue to you many, many points concerning what my reasons were against the death penalty as a lawyer, and I started writing them all down, had the Legislative Journal, was going to state to you how it is not a deterrent, how statistics prove that people still shoot people, and that the death penalty doesn't warrant the reasons that are going to be put forth, but ladies and gentlemen of the jury, I am not going to do that. I am not going to tell you that I am not begging you for your mercy. I am going to beg. Excuse me if I ramble and babble, but I am going to tell you that we are talking about a twenty-eight year old man, an intelligent man. He is young and there is still a possibility—years down the road possibly—to help develop this person. What happened that night to Dalton Smith-burger is a tragedy, but it would be an equal tragedy to take another man's life because we cannot change what happened that night. Now, the Legislature, as Judge Adams will tell you, stated that you are to put to death same persons in certain instances, and Mr. Solomon says that this is the instance when [4] you should put someone to death. Maybe Mr. Solomon is a better man than me because I don't know what—the Legislature doesn't really tell us—it lets it up to the twelve individuals to make that determination. I can't make that determination and no one else can except you twelve individuals who were chosen to hear this case. I don't want anyone

to take offense if at times I may quote the Bible, but remember that we may hate sin—"thou shalt not kill," but we can still love the sinner. We can still take this man into our hands and hope that at some point in his life he can be rehabilitated—try to understand his ways. Also, I would like to take a passage from Chapter 8 of the Book of John which deals with an adulteress, and they were going to stone the adulteress because of the commandment "thou shalt not commit adultery." They asked the Lord if this was a mockery, and the Lord told them "you who have not sinned cast the first stone." Everybody went away. Think of that. People make mistakes in their lives—some may be more serious than others, but that is not the question. The question is whether you want to place this person in the position where he will be put to death. Maybe one of the best examples of this particular instance in the most recent years was when the Pope was shot. He didn't say "kill that man." He said "put him away and pray for that man" and he forgave him. There was also Abel and Cain, who were brothers and one killed out of jealousy. God came down and spoke to the survivor. He didn't put him to death. He merely banished him for life on his own, and that is your determination today, Members of the Jury—banishment for [5] life, or death. Thank you.

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IN THE COURT OF COMMON PLEAS  
OF FAYETTE COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

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(Title Omitted in Printing)  
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**CONVICTION—FIRST DEGREE HOMICIDE  
SENTENCE OF THE JURY**

1. We, the jury, unanimously sentence the defendant to  
☒ (X) Death  
☐ ( ) Life Imprisonment
2. We, the jury, have found unanimously  
☒ (X) at least one aggravating circumstance and  
no mitigating circumstance. The aggravat-  
ing circumstance(s) (is) (are) :  
Death resulted during commission of a  
robbery.

Jury polled.

No. 12

/s/ Paul Davis  
Foreman

IN THE COURT OF COMMON PLEAS  
OF FAYETTE COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

\_\_\_\_\_  
(Title Omitted in Printing)  
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**OPINION**

ADAMS, J.

A Fayette County Criminal Court Jury found the defendant, Scott Wayne Blystone, guilty of the charges of murder in the first degree, robbery, criminal conspiracy to commit homicide, and criminal conspiracy to commit robbery.

Following the sentencing hearing, the jury unanimously sentenced the defendant to death.

Jeffrey W. Whiteko, trial counsel for the defendant, (hereafter referred to in this opinion as "trial counsel"), timely filed a motion for a new trial and motion in arrest of judgment.

Subsequently, the defendant maintained that trial counsel was ineffective at trial. Trial counsel, with the consent of the defendant, was permitted to withdraw, and the court, with the approval of the defendant, appointed Samuel J. Davis (hereafter referred to in this opinion as "post-trial counsel") to represent the defendant on all issues raised by the defendant, including ineffectiveness of trial counsel.

Trial counsel in his motion for new trial and motion in arrest of judgment alleged the following:

1. The trial judge erred in denying the defendant's motion to suppress communications and evidence since the

Commonwealth failed to establish probable cause to permit the wiretapping of defendant's conversation.

2. The District Attorney should not have permitted the wiretapping of defendant's conversation since it was not demonstrated that the informant was reliable.

3. The Title on Wiretapping is unconstitutional and violates the defendant's right of privacy assured by the Fourth and Fifth Amendments to the United States Constitution.

4. The District Attorney's Office should not have been permitted to issue warrants for wiretapping this particular defendant's conversation since the said office cannot be an independent source to judge the evidence when it has a strong interest in the outcome of the cases.

5. The defendant's Fourth and Fifth Amendment rights were violated since the District Attorney's Office did not have probable cause to issue the warrant.

6. The informant's consent was not given voluntarily and thus defendant's motion to suppress the communication and evidence should have been granted.

7. The trial judge erred in not sequestering those jurors selected during voir dire since the case was highly publicized in the media.

8. The trial judge erred in not sequestering the jury during the trial because of the adverse trial publicity. Said adverse publicity was highly prejudicial against the defendant during his trial.

9. The publicity brought forth by the media during defendant's trial was highly prejudicial against the defendant.

10. The publicity concerning the trial of a co-defendant was highly prejudicial to the defendant.

11. The defendant's case was prejudiced when Commonwealth witness, Neil Christopher, referred to the .22 caliber handgun as the "murder weapon."

12. The defendant's case was highly prejudiced when Commonwealth witness, Jacqueline Guthrie, twice referred to defendant's criminal record.

13. The trial judge erred in permitting the Commonwealth to introduce into evidence a .22 caliber handgun since it failed to establish a chain of custody.

14. The verdict was against the weight of the evidence since the testimony of Jacqueline Guthrie and Barbara Clark were contradictory.

15. The verdict was against the weight of the evidence since the Commonwealth failed to prove the identity of the voice on the tape beyond a reasonable doubt.

16. The trial judge erred in permitting the media to stand directly behind the jurors during the playing of a tape.

17. A juror should not be challenged peremptorily by the Commonwealth simply because the juror is against the death penalty.

18. The death penalty is unconstitutional because it constitutes cruel and unusual punishment under the Eighth Amendment.

19. The trial judge should have permitted defense counsel to introduce evidence to establish mitigating circumstances, although the defendant was against such a decision.

Defendant's post-trial counsel filed supplemental motions for new trial and motions in arrest of judgment setting forth the following reasons:

1. That the present situation does not present circumstances in which the death penalty is appropriate, and

its imposition shocks one's sense of justice, and said death penalty should be overruled by the trial court and a term of life imprisonment imposed.

2. That the defendant's right to a jury consisting of a fair cross-section of the community, as guaranteed by the United States and Pennsylvania Constitutions, was denied because the trial court allowed the prosecution to challenge for cause those potential jurors who had conscientious, moral or religious reservations about imposing the death penalty.

3. That the defendant was denied his right to effective assistance of counsel by trial counsel's failure to use a peremptory strike to eliminate the juror, Battaglini, from the jury after the defendant's challenge for cause as to said juror was denied.

4. That the jury's verdict of guilty on the robbery charge was against the evidence and the weight of the evidence in that insufficient evidence was presented regarding the taking of any of the victim's property.

5. The trial judge erred in failing to instruct the jury specifically that the corpus delicti of the crime of robbery must be made out by independent evidence aside from the defendant's admissions or confessions concerning said offense.

6. That the defendant was denied his right to effective assistance of counsel in that his trial counsel failed to object to the charge of the Court which neglected to clearly state the corpus delicti requirement for the charge of robbery.

7. That the evidence adduced at trial did not sufficiently prove the corpus delicti of the crime of robbery. Specifically, there was a lack of independent and substantial evidence concerning any theft of the victim's property.

8. That since the verdict of guilty on the robbery charge returned by the jury was erroneous, then the death

penalty was improperly imposed by the jury in that the robbery formed the sole aggravating circumstance found by the jury.

9. That the defendant was denied his right to effective assistance of counsel in that his trial counsel disregarded his specific instructions regarding the questioning of the prosecution witness, Jacqueline Guthrie.

10. That the defendant was denied effective assistance of counsel by trial counsel's failure to make a motion in limine to require the Court and prosecutor to caution all prosecution witnesses to avoid any mention of the defendant's prior record. Said failure resulted in three instances in which prosecution witnesses mentioned or implied that the defendant had been involved in prior criminal activity.

11. That the procedure by which the alleged conversation of the defendant was tape-recorded violated the defendant's rights to privacy and self-incrimination guaranteed him by Article I, Section 8, of the Pennsylvania Constitution.

12. That the procedure by which the alleged conversation of the defendant was tape-recorded violated the defendant's rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, and Article I—Section 1 of the Pennsylvania Constitution, and his right to be heard in a criminal prosecution secured by Article I, Section 9 of the Pennsylvania Constitution.

13. That the defendant was denied his right to effective assistance of counsel by trial counsel's failure to attempt to rehabilitate jurors who expressed reservations concerning the imposition of the death penalty.

14. That the defendant was denied his right to effective assistance of counsel by trial counsel's failure to call any

alibi witness on his behalf, despite his knowledge of the same.

15. That the defendant was denied his right to effective assistance of counsel by trial counsel's failure to properly investigate the existence and possible testimony of the defendant's alibi witnesses.

16. That the defendant was denied his right to effective assistance of counsel by trial counsel's failure to object and request a cautionary instruction when a witness mentioned or implied the existence of defendant's prior criminal record.

17. That the defendant was denied his constitutional right to a fair trial by the three references by two separate witnesses which mentioned or implied the existence of the defendant's prior criminal record. In addition, the defendant was denied his right to effective assistance of counsel by trial counsel's failure to move for a mistrial when the references to the defendant's prior criminal record were elicited before the jury.

18. That the trial judge erred in allowing the victim's father to testify concerning the victim's character, intelligence, and propensity to follow orders. Said testimony was irrelevant or in the alternative was so highly prejudicial to the defendant as to outweigh its slight relevance.

19. That the aggravating circumstance on which the jury based its death sentence finding is unconstitutional in that it is over-broad and bears no reasonable relationship to the determination of the appropriate penalty for defendant's conviction of first degree murder.

20. That the three references by two Commonwealth witnesses to the defendant's criminal record improperly tainted the death sentence determination by the jury.

21. That the trial court erred in denying the defendant's motion for an evidentiary hearing to present testi-

mony concerning the prosecution proneness of the jury that convicted him.

22. That the defendant was denied his constitutional right to effective assistance of counsel by his trial counsel's failure to raise any prosecution proneness objections at pretrial or during the trial of the case.

A hearing was held April 12, 1985 on the allegations of ineffectiveness of trial counsel. Several areas of ineffectiveness of trial counsel, not specifically enumerated in defendant's supplemental motion for new trial and motion in arrest of judgment were also raised.

The court will deal with each allegation and, where appropriate, combine those issues that are related.

# 1. THE VERDICTS OF GUILTY OF MURDER IN THE FIRST DEGREE WITH THE IMPOSITION OF THE DEATH PENALTY, ROBBERY, CONSPIRACY TO COMMIT MURDER, AND CONSPIRACY TO COMMIT ROBBERY WERE AGAINST THE WEIGHT OF THE EVIDENCE.

The test of the sufficiency of the evidence is whether, after the Court has reviewed all of the evidence in the light most favorable to the Commonwealth and has drawn all reasonable inferences therefrom in favor of the Commonwealth, the evidence is sufficient in law to enable a jury to find each and every element of the crimes charged beyond a reasonable doubt. *Commonwealth vs. Carter*, 329 Pa. Super. 490, 495, 496, 478 A.2d 1286, 1288 (1984); *Commonwealth vs. Nelson*, 320 Pa. Super. 488, 491, 467 A.2d 638, 640 (1983).

A new trial will be granted on the grounds that the verdict is against the weight of the evidence only where the verdict is so contrary to the evidence as to shock one's sense of justice. *Commonwealth vs. Jensch*, 322 Pa. Super. 304, 313, 469 A.2d 632, 637 (1983).

Whether to grant a new trial for this reason is committed to the sound discretion of the trial court. *Com-*

*monwealth vs. Pronkoskie*, 498 Pa. 245, 251, 445 A.2d 1203, 1206 (1982); *Commonwealth vs. Jensch*, *supra*, at 313, 469 A.2d at 636.

Applying this standard, the Commonwealth established that on the evening of September 9, 1983 between the hours of approximately 6:00 p.m. on that date and 2:00 or 3:00 in the morning of September 10, 1983 the defendant, Scott Wayne Blystone, was in the company of Jacqueline Guthrie, Barbara Clark and George Powell (hereinafter in this opinion Scott Wayne Blystone will be referred to as "Blystone," Jacqueline Guthrie as "Guthrie," Barbara Clark as "Clark," and George Powell as "Powell").

The group remained together during the time stated herein and at one point stopped for sandwiches at the "AM-PM Mini-Mart" situate in the City of Uniontown. After leaving the "AM-PM Mini-Mart," they drove east from Uniontown on Route 40 to Hopwood.

At approximately 12:00 midnight, as they approached the area of the "Pizza Hut" situate in Hopwood, Blystone observed a young man hitchhiking. The Commonwealth established that the hitchhiker was Dalton Charles Smithburger (hereinafter in this opinion referred to as "Smithburger").

Blystone said "I am going to pick this guy up and rob him, okay, Barbie?" (TT 5-B) Barbie said "yeh, okay, go ahead, I don't care," and Powell said "yeh, it's cool." (TT-6-B) Blystone stopped the car and asked Smithburger if he wanted a ride. Smithburger was not known by any of the parties but was described as "tall with dark hair and wearing a light blue suit and black shoes."

Blystone asked Smithburger if he had any money, to which he replied that he only had three dollars.

Blystone turned off Route 40 toward Little Brownfield. He then pulled a gun which he had been carrying all evening and pointed it to Smithburger's head. Blystone

ordered Smithburger to close his eyes, put his hands on the dashboard and look ahead. Smithburger complied. Smithburger then opened his eyes. Blystone started to yell at him. He said "I told you once, you mother f'er, if you don't keep your f'n eyes closed I will blow your f'n brains out." (TT-7-5)

Blystone again asked Smithburger how much money he had and again Smithburger stated that he had three dollars. Blystone told Smithburger "you are only going to lose your money, not your life." (TT-8-B)

When they arrived at the Little Brownfield area, Blystone got out of the car, walked around the car, took Smithburger out of the car, and walked with him into a nearby field. Blystone returned in five minutes without Smithburger. He asked what he should do "kill the boy or what because he can identify us." (TT-9-B). Guthrie shrugged her shoulders and Powell said "do what you have to do." (TT-10-B)

Blystone left the car and shortly thereafter six shots were heard. The time was approximately 12:30 a.m. When Blystone returned, he said "it was thrilling." (TT-10-B)

Blystone then drove to the "Hi-To Gun Glub," where he stopped and told Clark, Guthrie and Powell that he would kill all of them if they told. (TT-11-B) From there they proceeded to Powell's apartment where Blystone laid money on the stand and said he had gotten "\$13.00 from the boy." (TT-12-B)

At this time Blystone described what had happened. Blystone said he made Smithburger lie face down and that before he shot him he asked him what kind of car he was in and Smithburger said all he knew was that he was in a green car and it was smashed in the back—in the rear—and then he said "bye-bye" and then shot him. (TT-12-B)

The Commonwealth further established that sometime around the 12th of December, 1983, Miles Miller (hereafter in this opinion called "Miller") contacted the Pennsylvania State Police stating that he had received information from Powell that Blystone had killed a man in Brownfield and had taken \$13.00 from him. Powell told Miller that he, Blystone, Guthrie, and Clark were present when the killing occurred.

On December 15, 1983, District Attorney Gerald R. Solomon met with Miller, Sergeant George R. Fayock of the Pennsylvania State Police, Trooper Roy Fuller of the Pennsylvania State Police, Trooper Robert V. Teagarden of the Pennsylvania State Police, and Assistant District Attorney Ralph C. Warman.

After reviewing the State Police file, Mr. Solomon and Mr. Warman met privately with Miller. Miller related the same information to the District Attorney and Assistant District Attorney that he had previously related to the State Police concerning the information he had received from Powell relating to the homicide.

Miller voluntarily agreed to have a body wire placed on his person without any promise, threat or coercion, and on December 12, 1983, executed a memorandum of consent to be wired. The District Attorney executed a memorandum of approval as required by the Act.

Trooper Robert V. Teagarden, a member of the Pennsylvania State Police for approximately fifteen years, specializing in undercover work and electronic surveillance work, had an A-Certification for electronic surveillance and wiretapping which authorized him to monitor the conversations where one party had consented to have the conversations intercepted and recorded.

An electronic recording device was placed on Miller by Trooper Teagarden, which received and electronically recorded the conversations.

In addition, there was a transmitter placed on Miller which transmitted conversation with Blystone to a recording device in a van of the police officer that would receive and record the conversation.

Miller met with Blystone and their conversation concerning the homicide was recorded.

The conversation of Blystone and Miller is as follows:

"BLYSTONE: Do you remember the body they found along the road next to the "Redhead"—along Brownfield Road? Remember the body they found?

MILLER: Huh-uh.

BLYSTONE: Smithburger—found him laying in a field shot six times.

MILLER: I don't read the fucking paper.

BLYSTONE: Shot six times in the head.

MILLER: Six Times?

BLYSTONE: Six times in the back of the head.

MILLER: Must have been a strong son-of-a-bitch, huh?

BLYSTONE: They found five bullets in his head and a fragment of one and they said he had on a blue suit, a three piece suit, and lived up on the mountains, and they found him about a mile from the Redhead. Remember?

MILLER: Scott, I don't read the God damn paper.

BLYSTONE: Tell you what—go to the library.

MILLER: I am not going to no fucking library.

BLYSTONE: Me and Jackie—you got to keep this quiet we were out one night, and we didn't have any money, and I had a .22 and I kept telling them that we got to get money. We tried all kinds of shit and that wasn't working so I said 'fuck it—I'm going to just drive up and blow somebody's brains out and take their wallet.' George was with us. Don't burn me.

MILLER: You think I'm going to fucking go to the state cops, man, and tell them 'hey, look, and all this and that, I know this Scott Blystone.'

BLYSTONE: Don't even tell Jackie that I told you this or she'll fucking flip." (TT-100-101)

The recorded statement further revealed that Blystone stated he picked up Smithburger in Hopwood along Route 40. He knew what he was going to do and he told everybody what he was going to do. He told Smithburger that in order to go up the mountain where Smithburger wanted to go that Blystone needed gas money. Smithburger said "Well, I got a little bit." (TT-102) This "ticked" the defendant off when he said "I can only give you a few dollars," (TT-102) so he pulled out the gun and put it to Smithburger's head. Blystone told Smithburger "get your fucking hands on the dashboard." (TT-103) Smithburger started to reach in his coat. Blystone said that Smithburger didn't have a gun, but he thought he did and that he almost splattered him right there. (TT-103)

Blystone took Smithburger out of the car at gunpoint and took him into a field. He found \$13.00 on him. He took the money from Smithburger and told him to "lay down" and "you wait right here. I'll be right back. Don't move or I'll blow your fucking brains out." (TT-104) Smithburger said "I ain't going nowhere." (TT-104)

Blystone returned to the car and told Guthrie, Clark and Powell that Smithburger could identify him. Blystone said "I go to kill him. Can everybody handle it?" Everybody said "yeh, go ahead, kill him." Blystone went back to Smithburger and asked him what kind of car picked him up. Smithburger replied "all I know is it was green and the back end was wrecked." (TT-105) "I said 'goodbye,' and he tightened up and I fucking wasted him. Blood splattered all over me. I shot him six times. You should have heard it, man. Pow, pow, pow, pow, pow, pow. Brains started oozing out of this fuck. Every hole I put in his head, brains would start oozing out each time I shot him. I found brains on my nose. Jackie picked them off my face that night." (TT-105)

Blystone and the others went back to Powell's house for about two hours. While there Blystone realized that he had handled a cigarette pack with his bare hands, so they went back to the site. Blystone told Powell "I'll take you over to the body." In the event anyone was observing Blystone and Powell, they pretended to accidentally discover the body.

Blystone said to Powell, "look, man, it is a fucking body," and they walked over. George put the light on this guy. "I grabbed him by his fucking coat, pulled him up—moved him up—and, man, he was nothing but a pool of blood. One eye was out and his fucking eyebrows—his whole brow, man, was like real swollen—looked like somebody had beat him with a baseball bat—cheeks were all swollen. There was holes in them and coming out his throat and, shit, his teeth were in the ground. They were blown in the ground." (TT-page 107)

Blystone stated that nothing ever happened and it was an unsolved murder. He stated that it was easy to kill someone and get away with it. He further stated, "murder is a real fucking experience. It's wild." (TT-113) He boasted, "George never believed me. When I used to say 'I'll kill him,' he'd look at me like 'yeh, sure, okay,' but now I tell George 'hey, I'll kill you,' he looks at me like 'this motherfucker is going to kill somebody.'" (TT-114) "When I tell him that I'll kill him, it don't mean I'm going to 'beat you up or hurt you; it means I'm going to kill you.'" (TT-114) "And Jackie looks at me different, you know." (TT-114)

Blystone further stated "it don't make you feel bad, Miles. It don't make you feel like an ogre," and in response to a question from Miller, "you don't dream about it or nothing, huh?", Blystone replied "no, we laugh about it. Miles, it gives you a realization that you can do it, man. You can walk up and blow somebody's brains out and you know that you can get away with it. It gives you a feeling of power, self-confidence, you know." (TT-114)

Miller identified the voice on the tape as that of Blystone, and also testified as to what Blystone had told him as to the murder of Smithburger. Miller's testimony in court was totally consistent with that which was presented on the tape (although not in as much detail).

The testimony of Guthrie and Clark was corroborated by the testimony of Arthur Richard Evans, a bartender at the "Hopwood Tavern" in Hopwood, Pennsylvania, that Dalton Charles Smithburger, who was known to Mr. Evans, left the tavern on the evening of September 9, 1983 at approximately 11:30. At that time Smithburger took with him a quart of beer in a paperbag. (TT-5)

Gina Marie Mathieson testified that she saw the victim in the "Pizza Hut Restaurant" in Hopwood around midnight. She described Smithburger and stated that he left the "Pizza Hut carrying a Pepsi-Cola in a papercup, and that she saw him walk in the direction of Route 40. (TT-7)

Judith Menner, who lives near Brownfield close to the point where Smithburger's body was found, testified that she heard gunshots at approximately 12:30 a.m. on the morning of September 10, 1983. (TT-9)

Dr. Manuel Pelaez, the pathologist, performed an autopsy on Smithburger which revealed six gunshot wounds in the back of the head of Smithburger which, according to the pathologist, was the cause of his death. (TT-20)

Smithburger was killed with a .22 caliber handgun. Blystone was carrying a .22 caliber handgun on the night of the killing.

Blystone elected to remain silent and did not testify nor offer any evidence during the trial of the case, and he elected to remain silent and did not offer any testimony during the sentencing phase of the trial.

During the sentencing phase of the trial he refused to permit trial counsel to call any witnesses on his behalf despite the efforts of his trial counsel and the court to encourage him to do so.

The court will discuss each of the verdicts of guilty in turn.

## 2. WAS THE VERDICT OF MURDER IN THE FIRST DEGREE AGAINST THE WEIGHT OF THE EVIDENCE?

Under the Pennsylvania Crimes Code, 18 P.S.C.A., Section 2502(a), the definition of murder in the first degree is as follows:

"Criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.

An intentional killing is defined under (d) of the section as follows: Killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing."

Clearly the evidence presented by the Commonwealth would enable the jury to find beyond any reasonable doubt that Blystone killed Smithburger by shooting him six times in the back of the head during the commission of the crime of robbery, and that he did so willfully, deliberately, and with premeditation and with malice.

Blystone's purpose in picking up Smithburger was to rob him. He announced his intention to do so and did in fact rob him.

Thereafter, because Blystone was fearful that Smithburger might identify him and other occupants of the car, he announced his intention to kill Smithburger and did so by firing six shots into the back of his head.

The Commonwealth's case was established by eye witnesses who were present and who testified as to events

leading up to the robbery, and upon recorded statements of Blystone as to his role in the murder, as previously set forth in this opinion.

There is no question in this court's mind that the Commonwealth produced evidence beyond a reasonable doubt which would justify the finding of the jury that he was guilty of murder in the first degree.

### 3. WAS THE VERDICT OF ROBBERY AGAINST THE WEIGHT OF THE EVIDENCE?

Blystone maintains that the jury's verdict on the robbery charge was against the weight of the evidence for the following reasons: Insufficient evidence was presented with regard to the taking of any of Smithburger's property; no corpus delicti of the crime of robbery was made out; and it was improper to introduce Blystone's admissions or conversations that he did in fact rob the victim since no corpus delicti of the crime of robbery had been proven.

Under the Crimes Code, robbery is defined as follows:

"(1) A person is guilty of robbery if, in the course of committing a theft he

- (i) inflicts serious bodily injury upon another;
- (ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury;
- (iii) commits or threatens immediately to commit any felony of the first or second degree;
- (iv) inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury; or

(v) physically takes or removes property from the person of another by force however slight.

- (2) An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission."

18 Pa. Cons. Stat. Ann., Section 3701

We would first note that, contrary to Blystone's contention, it is not necessary, in order to convict of the crime of robbery, that the Commonwealth must prove beyond a reasonable doubt that anything was in fact taken from the victim. The statute provides:

"An act shall be deemed in the course of committing a theft if it occurs in an attempt to commit theft." 18 Pa. Cons. Stat. Ann., Section 2701

It is well settled that before the Commonwealth may introduce a confession or admission of guilt made by the accused, it must be first established by independent evidence that a crime has been committed. *Commonwealth vs. Fried*, 327 Pa. Super. 234, 239, 475 A.2d 773, 775 (1984) (citing numerous cases supporting this proposition). However, while the corpus delicti rule requires that the Commonwealth establish through independent evidence that a crime has occurred before the admission of the accused may be admitted into evidence, it does not require that the corpus delicti of the crime be proven beyond a reasonable doubt. *Commonwealth vs. Byrd*, 490 Pa. 544, 556, 417 A.2d 173, 179 (1980). The preliminary burden of proof by the Commonwealth is slight, and it is for the trial judge to decide when the Commonwealth has sustained its burden establishing the corpus delicti. Once the trial judge has done so, the Commonwealth may admit the statements and admissions of the defendant to meet the ultimate burden of proof

beyond a reasonable doubt that the defendant has committed the crime, in this case the crime of robbery.

Blystone was charged with homicide as well as the crime of robbery. The Commonwealth established the corpus delicti of homicide when testimony was introduced to show that Smithburger was found dead in an isolated area where he had been taken by Blystone at gunpoint, having been shot in the head six times. Once these facts had been established by the Commonwealth, the admission of Blystone that he had committed the murder are admissible to prove the crime of murder, and his statement that he murdered Smithburger during the course of the robbery so that the victim could not identify him is also admissible to show motive, intent, malice, and that the murder was committed in the course of committing a felony.

Blystone is not challenging the admissibility of his statements on the charge of homicide,<sup>1</sup> but maintains that although the statements are admissible to prove homicide, his statement that he committed a robbery is not admissible unless independent of the homicide the Commonwealth is able to establish a corpus delicti of robbery. This is an interesting argument but this Court rejects it.

Once the Commonwealth makes out a corpus delicti of the homicide, the statement of a defendant that he killed the victim in the course of a robbery is admissible not only to show that he did kill the victim but also that he did so while in the course of a robbery.

It is not necessary to prove independent of the confession that the death occurred during a felony. *Com-*

<sup>1</sup> Blystone is however challenging the use of the statement that Blystone robbed the victim to establish an aggravating circumstance justifying the imposition of the death penalty as will be discussed later on in this opinion. Blystone also seeks to suppress his taped statements.

*monwealth vs. Weeden*, 457 Pa. 436, 444, 322 A.2d 343, 348 (1974); *Commonwealth vs. Leamer*, 449 Pa. 76, 83-84, 295 A.2d 272, 275 (1972). *Com. vs. Coley*, — Pa. Super. —, —, 504 A.2d 1286, 1290 (1987).

Further, the crimes of murder and robbery arose from a single transaction and had in common the killing of Smithburger. Thus Blystone's statement describing the single criminal incident during which both of the crimes occurred was admissible as to both once the corpus delicti of murder was established. *Commonwealth vs. Steward*, 263 Pa. Super. 191, 197, 397 A.2d 812, 814 (1979).

In any event, there was ample evidence presented by the Commonwealth to establish a corpus delicti of a robbery.

The evidence of the Commonwealth established, independent of all the statements of Blystone, that he robbed Smithburger. Blystone observed Smithburger standing along Route 40. He picked him up and inquired of him as to whether he had any money. Blystone became irritated when Smithburger told him he only had three dollars. Blystone then pulled a gun, placed it to Smithburger's head, told him to shut his eyes and place his hands on the dashboard, and told him that he was only going to lose his money, not his life. He then drove the car to an isolated area, removed the victim from the car at gunpoint, took him into an open field, and six shots were heard. Blystone returned without Smithburger and subsequently showed his companions thirteen dollars that he did not have prior to picking up Smithburger. This establishes a corpus delicti of robbery beyond a reasonable doubt, at which time the statements of Blystone are admissible on the issue of robbery. These statements established in detail that Blystone intended to find a person to rob, that he made a statement prior to picking up Smithburger that he intended to rob him, and that he killed him in the course of the robbery to prevent Smithburger from identifying him.

Applying the standard, the test of the sufficiency of the evidence, as previously set forth, this court is of the opinion that the evidence is sufficient in law to enable a jury to find each and every element of the crime of robbery beyond a reasonable doubt.

4. WAS THE VERDICT OF CONSPIRACY TO COMMIT ROBBERY AGAINST THE WEIGHT OF THE EVIDENCE?
5. WAS THE VERDICT OF CONSPIRACY TO COMMIT MURDER AGAINST THE WEIGHT OF THE EVIDENCE?

"(a) A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he: (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime. . . .

"(e) No person may be convicted of conspiracy to commit a crime unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired." . . . 18 P.C.S.A. Section 903.

As to the charge of conspiracy to commit robbery, the Commonwealth established that Blystone, as he was driving on Route 40 toward Hopwood with Powell, Guthrie, and Clark, saw Smithburger, the victim, hitchhiking along the road. Blystone said to Clark "I am going to pick this guy up and rob him, okay, Barbie?" Barbie replied, "yeh, okay, go ahead, I don't care" and George said "yeh, it's cool." (TT-5B) (TT-6B)

Blystone then picked up Smithburger, drove off Route 40 onto an isolated road and then placed a gun to the head of the hitchhiker, Smithburger. When they arrived at the Little Brownfield area, Blystone pulled off the road. Blystone told Powell to watch Smithburger so that he would not get out while he went around the car. Blystone then left the car, went to the other side and, during the interval, Powell pointed his hand to the back of Smithburger's head. Blystone, when he got to the other side of the car, removed Smithburger from the car and took Smithburger into the field.

An overt act was committed in pursuance of the conspiracy when Blystone removed Smithburger from the car at gunpoint, took the sum of \$13.00 from him, and subsequently killed him so that he could not identify them.

There was sufficient evidence from which a jury could find beyond a reasonable doubt that Blystone entered into a conspiracy with the other occupants of the car to rob the victim, Smithburger.

As to the charge of conspiracy to commit murder, after Blystone had left the car with the victim at gunpoint, had taken him into the field, and had robbed him, he returned to the car and asked Powell, Guthrie, and Clark as to what he should do "kill the boy or what because he can identify us." After Blystone made that inquiry, Guthrie shrugged her shoulders and Powell said "do what you have to do." Blystone went back into the field and shot Smithburger six times in the back of the head.

The overt act in pursuance of that conspiracy was the killing of Smithburger by Blystone. The Commonwealth has presented evidence from which a jury could find beyond any reasonable doubt that there was a conspiracy between Blystone and the other occupants of the car to murder Smithburger so that he could not identify them.

For the reasons stated herein, the court denies the motion for new trial and motion in arrest of judgment on the charge of conspiracy to commit robbery and conspiracy to commit murder.

6. WAS IT ERROR FOR THE COURT NOT TO CHARGE THE JURY THAT THEY MUST FIRST INDEPENDENTLY DETERMINE WHETHER THE COMMONWEALTH HAD ESTABLISHED A CORPUS DELECTI OF ROBBERY BEFORE THEY COULD CONSIDER THE CONFESSION OR ADMISSION OF GUILT BY THE DEFENDANT?
7. WAS THE DEFENDANT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO OBJECT TO THE CHARGE WHEN THE TRIAL JUDGE DID NOT CHARGE THE JURY THAT THEY MUST INDEPENDENTLY DETERMINE WHETHER THE COMMONWEALTH HAD ESTABLISHED A CORPUS DELECTI OF ROBBERY BEFORE THEY COULD CONSIDER THE CONFESSION OR ADMISSION OF GUILT BY THE DEFENDANT?

Trial counsel did not request the court to charge that, in order for the jury to consider the admissions and the confessions that he robbed the victim, the Commonwealth must first establish by evidence other than the admissions or confessions of the defendant that a crime was committed. Therefore, this issue is waived on direct appeal.

Blystone also contends that he was denied his right to effective assistance of counsel in that trial counsel did not request the court to charge on the issue of corpus delecti.

The court would first comment that the standard for evaluating counsel's ineffectiveness has been articulated

many times by our Appellate Court. The test is whether the particular course chosen by counsel had some reasonable basis designed to effectuate his client's interest. Although weigh the alternatives we must, the balance tips in favor of a finding of effective assistance as soon as it is determined that trial counsel's decision had any reasonable basis. *Commonwealth ex rel Washington vs. Maroney*, 427 Pa. 599, 604, 235 A.2d, 349, 352 (1967); *Commonwealth vs. Mott*, 278 Pa. Super. 332, 335, 336, 420 A.2d 567, 568 (1980).

However, it is only when the course or strategy foregone by counsel was of arguable merit or could have supported the claimed defense that the court must inquire as to counsel's position for not pursuing it.

Additionally, there is a presumption that trial counsel was effective, and the burden of establishing counsel's ineffectiveness rests upon the defendant. *Commonwealth vs. Miller*, 494 Pa. 229, 233, 431 A.2d 233, 235 (1981).

The court will apply this standard in evaluating Blystone's various contentions of ineffectiveness of counsel.

Blystone contends, and properly so, that when the facts of the case present a corpus delecti issue, this issue should be framed in crystal clear terms in the jury instructions. See *Commonwealth vs. Fried*, 327 Pa. Super. 234, 475 A.2d 773 (1984); *Commonwealth vs. Frazier*, 411 Pa. 195, 191 A.2d 369 (1963). However, in this court's judgment there was no issue of corpus delecti and it was not ineffectiveness of counsel in failing to request the court to charge on the corpus delecti issue.

The court, for reasons previously set forth in this opinion, determined that the Commonwealth did clearly establish a corpus delecti of robbery, independently of any admission or statements of Blystone, as well as the corpus delecti of homicide.

In order for counsel's failure to request a charge to constitute ineffectiveness so as to warrant a new trial, it is necessary to establish that the requesting of the charge would have affected the outcome of the case. Clearly, it would not have; therefore, there is no merit in seeking a new trial on this issue.

**8. DID THE TRIAL COURT ERR IN REFUSING TO SUPPRESS THE TAPE RECORDING OF THE CONVERSATION OF MILES MILLER AND THE DEFENDANT?**

Blystone maintains, *inter alia*:

(a) That the trial judge erred in denying the defendant's motion to suppress communications and evidence since the Commonwealth failed to establish probable cause to permit the wiretapping of defendant's conversation.

(b) That the District Attorney should not have permitted the wiretapping of defendant's conversations since it was not demonstrated that the informant was reliable.

(c) That the Title on Wiretapping is unconstitutional and violates the defendant's right of privacy assured by the Fourth and Fifth Amendments to the United States Constitution.

(d) That the District Attorney's Office should not be permitted to issue warrants for wiretapping this particular defendant's conversation since the said office cannot be an independent source to judge the evidence when it has a strong interest in the outcome of the cases.

(e) That the defendant's Fourth and Fifth Amendment rights were violated since the District Attorney's Office did not have probable cause to issue the warrant.

(f) That the informant's counsel was not given voluntarily and thus defendant's motion to suppress the communication and evidence should have been granted.

(g) That the Commonwealth failed to establish that the voice on the tape was Blystone's.

The issue is whether the District Attorney met the requirements of the Pennsylvania Wiretapping and Surveillance Act, 18 Pa. C.S.A., Section 5704(2)(ii) and whether the Act is unconstitutional in violation of the Fourth and Fifth Amendments to the United States Constitution, and in violation of Article 1, Section 8, of the Pennsylvania Constitution, as an unlawful invasion of privacy.

18 Pa. C.S.A. Section 5704(2)(ii) provides in pertinent part:

"It shall not be unlawful under this chapter for (2) any investigative or law enforcement officer, or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire or oral communication involving suspected criminal activities where (ii) one of the parties to the communication has given prior consent to such interception; however, no interception under this paragraph shall be made unless the attorney general or the District Attorney, . . . of the County wherein the interception is to be made, has reviewed the facts and is satisfied that the consent is voluntary, and has given prior approval for the interception; however, such interception shall be subject to the recording and record-keeping requirements of Section 5714(a) (relating to recording or intercepting communications) and that the attorney general . . . or district attorney . . . authorizing the interception shall be the custodian of recorded evidence obtained therefrom."

During the suppression hearing held before trial, the Commonwealth established that the State Police had been conducting an on-going investigation since September of 1983 when Smithburger's body had been found. In December of 1983 Miller provided the Pennsylvania State Police and later the District Attorney of Fayette County with important information concerning the Smithburger homicide. Miller stated that he had spoken to Powell approximately one month or so prior to going to the State Police with his information. He related what Powell had told him about the murder, specifically how Powell, Clark and Guthrie were present with Blystone on the night that Smithburger was murdered.

Miller also revealed the particulars of the crime as related to him by Powell. Miller described where Smithburger had been picked up by Blystone and the others on the night of the murder, where they drove Smithburger on that night, the fact that it was Blystone who had done the actual shooting, and the amount of money that Blystone had taken from Smithburger. Under the totality of the circumstances, this court is satisfied that there had been a sufficient determination of probable cause to justify the authorization for intercepting and recording Blystone's conversation with Miller.

The District Attorney fully complied with the statute, determining that Miller's consent was voluntarily given and was not the result of either threats or promises. Thereafter, Miller executed a memorandum of consent witnessed by First Administrative Assistant District Attorney Ralph Warman. The District Attorney then executed the memorandum of approval authorizing the interception and recording of Miller's conversation with Blystone. The District Attorney also served as custodian of the recorded evidence in accordance with the statute.

Trooper Robert V. Teagarden, a member of the Pennsylvania State Police for approximately 15 years spe-

cializing in undercover work and electronic surveillance work, had an "A Certification" in electronic surveillance and wiretapping, which authorizes him to monitor conversations where one party to the conversation has consented to have the conversation intercepted and recorded. An electronic recording device was placed on Miller by Trooper Teagarden which received and electronically recorded the conversation. In addition, a Cal transmitter was placed on Miller which transmitted conversations with Blystone to a recording device in a van that also recorded the conversations.

As to the question of staleness, a determination as to staleness of information as it relates to probable cause must be made on a case-by-case basis. *Commonwealth vs. Samuels*, 326 Pa. Super. 561, 565, 474 A.2d 632, 634 (1984); *Commonwealth vs. Ryan*, 300 Pa. Super. 156, 170, 446 A.2d 277, 284 (1982). In the instant case, the information provided by Miller is not the type which would become stale and unable to sustain a finding of probable cause with the passage of time.

Blystone contends that a person in the District Attorney's position cannot be a neutral and detached issuing authority; however, the situation in the instant case was governed by the statute, 18 Pa. C.S.A. Section 5704, which states that the District Attorney is a proper issuing authority under the circumstances, and the court finds as a fact that the Act was fully complied with.

The contention that the Act is unconstitutional must also fail.

Article I, Section 8, of the Pennsylvania Constitution reads:

"The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue

without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant."

All issues raised by Blystone challenging the constitutionality of the Act are addressed in the case of *Commonwealth vs. Victor Hassine*, — Pa. Super. —, 490 A.2d 438 (1985). See also *Commonwealth vs. Doty*, — Pa. Super. —, 498 A.2d 870 (1985). The court set forth in *Hassine* that it is abundantly clear that the type of wiretapping executed here, similar to the one conversant consensual tap allowed under Federal Law, is legal under the U. S. Constitution—citing *U. S. vs. Caceres*, 440 U.S. 741, 744, 99 S. Ct. 1464, 1467, 59 L.Ed. 2d 733, 738 (1979).

The court then determined that the General Assembly has given legal responsibility to the law enforcement officers to properly conduct wiretapping where one person consents. 18 Pa. C.S. Section 5704(2)(ii) and 5714(a).

The function of determining whether or not to permit this type of wiretapping was delegated by the Constitution to the General Assembly. *Commonwealth vs. Baldwin*, 282 Pa. Super. 82, 95, 422, A.2d 838, 845 (1980); *Commonwealth vs. Bennett*, 245 Pa. Super. 457, 461, 369 A.2d 493, 494 (1976). The court further stated "in such a situation we shall not disturb the Legislature's exercise of discretion especially where the statute does not clearly, palpably and plainly violate the Pennsylvania Constitution.

The Commonwealth identified the voice on that tape as that of Blystone by the testimony of Miller, a friend of Blystone, who engaged Blystone in the conversation that was recorded.

Therefore, since the Act authorizing the recording of the conversations is constitutional, and the Commonwealth fully complied with all of the terms and provi-

sions of the Act, and the Commonwealth established that the recorded voice was Blystone, the refusal to suppress the recorded conversations was proper.

#### 9. DID THE TRIAL JUDGE ERR IN PERMITTING THE MEDIA TO STAND DIRECTLY BEHIND THE JURORS DURING THE PLAYING OF A TAPE?

Blystone maintains that the trial judge was in error in permitting the media to stand behind the jury box while a tape was being played.

Blystone did not object to the position of the reporters at the time of the playing of the tape, and the court does not know in fact where the reporters stood during the time the tape was played. The court was not aware that the reporters were standing behind the jury box during the playing of the tape, but there was no evidence of any impropriety and nothing offered in any way to show prejudice to Blystone. Blystone having failed to object when the incident, as alleged, was taking place, he has waived his right to do so now.

#### 10. THE TRIAL JUDGE ERRED IN ALLOWING THE VICTIM'S FATHER TO TESTIFY CONCERNING THE VICTIM'S CHARACTER, INTELLIGENCE, AND PROPENSITY TO FOLLOW ORDERS.

Prior to the calling of Dalton C. Smithburger, Sr. as a Commonwealth witness, the trial counsel asked for an offer of proof. In response to this request the District Attorney stated, "I intend to offer him to testify as to when he last saw his son and what he was wearing and where he made the identification of the body and also what type of student his son was." (TT-24) In response to this offer of proof, trial counsel stated that he would stipulate to the identification testimony and he objected to the other parts of the offer. The trial court overruled

Blystone's objection. (TT-25) The following testimony was elicited by the District Attorney:

"Q Mr. Smithburger, what kind of student was your son?

A Well, he went to Tech School and he passed his wedding class.

Q How would you describe your son—was he a troublemaker?

A No, never a troublemaker.

Q How was he as far as listening?

A He listened pretty good.

Q If someone were to tell him something, would he do it?

A Yes, he would.

Q I believe you told the police he was in special education?

A Yes."

(TT-26-27)

Blystone maintains that this testimony as to the victim's character, intelligence, and propensity to follow orders was improperly admitted.

Blystone argues that the fact the victim was in "special education" could have created an impression in the minds of the jurors that he was a particularly vulnerable victim to criminal activity, and that this testimony had the natural and inevitable effect of creating sympathy for the deceased victim while clouding the issue of Blystone's culpability for his death.

The court feels that this argument is entirely without merit. The testimony, in this court's judgment, is relevant in that it did tend to establish the passive nature

of the victim and to lend credibility to the testimony of the Commonwealth witness that the victim, Smithburger, remained in the field for a period of time without fleeing while Blystone returned to the car to discuss the necessity of killing him.

The testimony of the father was delivered in a matter-of-fact tone and was not done in a manner which would inflame the jury.

# 11. DID THE TRIAL JUDGE ERR IN NOT SEQUESTERING THOSE JURORS SELECTED DURING VOIR DIRE AND TRIAL?

Blystone maintains that the trial judge erred in denying his motion to sequester the jury during voir dire and trial, alleging that he was prejudiced because the publicity surrounding the trial was of such a nature as to deny him a fair trial.

Pennsylvania Rule of Criminal Procedure 1111(a) provides:

"The trial judge may, in his discretion, order sequestration of trial jurors in the interest of justice."

Absent a showing of potential prejudice from the refusal to sequester a jury, the discretion of the trial court will not be disturbed. *Commonwealth vs. Sourbeer*, 492 Pa. 17, 19, 422 A.2d 116, 121, 122 (1980). *Commonwealth vs. Bruno*, 466 Pa. 245, 257, n.5, 352 A.2d 40, 46, n.5, (1976).

The Appellate Courts have recognized that the trial court does not abuse its discretion in refusing to sequester jurors where the trial judge continually cautioned the members of the jury to refrain from reading, or listening to, media accounts of the incident. *Commonwealth vs. Sourbeer*, supra; *Commonwealth vs. Smith*, 290 Pa. Super. 33, 42-43, 434 A.2d 115, 120 (1981);

*Commonwealth vs. Gillespie*, 290 Pa. Super. 336, 343, 434 A.2d 781, 785 (1981).

This court in the instant case acted promptly and regularly to insure that any publicity which might occur would have no effect on the proceedings. The jurors were cautioned at the end of each day's session to refrain from reading any newspaper accounts, listening to radio broadcasts or conversations, and to refrain from discussing the case among themselves. In addition, the court questioned the jury panel prior to the commencement of the trial and at the beginning of each day's session to determine whether any juror had in fact read any newspaper account or heard any radio broadcast that referred to the case or otherwise related to Blystone. These questions were always answered in the negative.

Moreover, unlike the characterization which Blystone urges, the publicity in the instant case was not unusual or prejudicial, but rather was factual and non-hysterical. The media coverage did not exceed that which might be expected to accompany any capital case. Under the circumstances the court is satisfied that there was no abuse of its discretion, nor was there any resulting prejudice to Blystone by virtue of the court's refusal to sequester the members of the jury during the trial.

Blystone next argues that he was denied a fair trial because of inherently prejudicial publicity surrounding both his own trial and that of a co-defendant, George Powell. More specifically, Blystone contends that the jurors selected to hear his case had too much exposure to pretrial information to permit a fair trial.

The United States Supreme Court and the Pennsylvania Appellate Courts have long recognized that one who claims he was denied a fair trial because of prejudicial pretrial publicity must show actual prejudice in the empanelling of the jury. *Murphy vs. Florida*, 421 U.S. 794, 800, 95 S. Ct. 2031, 2036, 44 L.Ed 2d 589, 595

(1975); *Commonwealth vs. Bachert*, 499 Pa. 398, 408, 453 A.2d 931, 936 (1982) *cert. denied*, 460 U.S. 1043, 103 S. Ct. 1440, 75 L. Ed. 2d 797 (1983); *Commonwealth vs. Casper*, 481 Pa. 143, 150, 392 A.2d 287, 291 (1978). However, this rule is subject to an important exception:

"In certain cases there 'can be pretrial publicity so sustained, so pervasive, so inflammatory, and so inculpatory as to demand a change of venue without putting the defendant to any burden of establishing a nexus between the publicity and actual jury prejudice,' *Commonwealth vs. Frazier*, 471 Pa. 121, 127, 369 A.2d 1224, 1227 (1977), because the circumstances make it apparent that there is a substantial likelihood that a fair trial cannot be had."

*Commonwealth vs. Casper*, 481 Pa. at 151, 392 A.2d at 291.

A presumption of prejudice to this exception requires the presence of exceptional circumstances. *Commonwealth vs. Bachert*, 499 Pa. at 412, 453 A.2d at 938. Neither the mere existence of pretrial publicity nor a possibility that prospective jurors will have formed an opinion based on news accounts will suffice to establish a presumption of prejudice. *Commonwealth vs. Casper*, *supra*; *Commonwealth vs. Keeler*, 302 Pa. Super. 324, 329, 448 A.2d 1064, 1066 (1982).

In cases similar to the instant case, the Pennsylvania Supreme Court often refers to a frequently quoted passage in *Irvin vs. Dowd*, 366 U. S. 717, 722-23, 81 S. Ct. 1639, 1642-43, 6 L.Ed. 2d 751, 756 (1961):

"It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to

the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

See *Commonwealth vs. Bachert*, 499 Pa. at 410-11, 453 A.2d at 937; *Commonwealth vs. Casper*, 481 Pa. at 152, 392 A.2d at 292.

The inquiry of primary importance thus becomes whether any juror formed a fixed opinion of Blystone's guilt or innocence as a result of the pretrial publicity. The trial judge in this case participated in the examination of the jurors, and to his satisfaction all who were selected pledged to give fair and impartial consideration to the evidence. None of the jurors expressed an inability to set aside any impression which may have been gained from media coverage.

In selecting the twelve jurors and two alternates, ninety-six potential jurors were individually examined during pretrial voir dire. All jurors who indicated that they had read or heard anything about the case which had caused them to form a fixed opinion as to Blystone's guilt, were excused for cause.

The court is unable to discern, nor has Blystone set forth, any actual prejudice in the seated jurors. The court is also unpersuaded by Blystone's assertion that the pretrial publicity was so inherently prejudicial that a climate was created in which Blystone would be denied a fair trial.

A number of the local newspaper stories attached as exhibits to Blystone's brief did not appear prior to the

trial, but rather during the course of the trial. Media coverage during the trial and its effect on the jurors has previously been addressed. Other articles from local newspapers appeared far enough in advance of the trial so that any potential prejudice was erased by the passage of time between publication of the stories and the commencement of trial. In any event, all of the articles were highly objective accounts of preliminary proceedings and events in this case. None of the articles can be said to have been so sensational, inflammatory, or inculpatory that a presumption of prejudice was created.

For the reasons set forth, the court rejects the contention of Blystone that he was denied a fair trial as a result of the trial court's refusal to sequester the jury.

## 12. THE TRIAL JUDGE ERRED IN PERMITTING THE COMMONWEALTH TO INTRODUCE INTO EVIDENCE A .22 CALIBER HANDGUN SINCE IT FAILED TO ESTABLISH CHAIN OF CUSTODY.

As to this allegation of error, the standard for the admissibility is set forth in *Commonwealth vs. Mayfield*, 262 Pa. Super. 96, 107, 396 A.2d 662, 667, 668 (1979). The court in that case stated, citing *Commonwealth vs. Jenkins*, 231 Pa. Super. 266, 271, 332 A.2d 490, 492 (1974):

"The admission of demonstrative evidence is a matter committed to the discretion of the trial court (citation omitted). The Commonwealth need not discount every hypothetical possibility of tampering with the evidence, but need only trace the chain of custody insofar as possible." (citation omitted)

The court further stated, citing *Commonwealth vs. Miller*, 234 Pa. Super. 146, 155, 339 A.2d 573, 578 (1975):

"There is no requirement that the Commonwealth establish the sancity of its exhibits beyond all moral certainty. It is sufficient that the evidence, direct and circumstantial, establish a reasonable inference that the identity and condition of the exhibits remain unimpaired until they were surrendered to the court." *Id.* at 155, 339 A.2d at 578

In the instant case the court finds that the Commonwealth did establish a proper chain of custody in order for the weapon to be admitted into evidence.

Jacqueline Guthrie testified that during July of 1983 she and Blystone went to the Genovese Coal Company yard at approximately 2:00 or 3:00 in the morning. Blystone had previously worked at Genovese Coal Company and he was going there because they owed him money and he wanted to try to get his money. He came back and showed her a black .22 caliber gun in a leather holster. She testified that it was the same weapon he had with him on the night of the killing on September 9th, 1983. She testified she was familiar with the weapon, that she had carried it, and that she had fired it a couple of times prior to the evening in question. She examined the weapon presented in court, which was a .22 caliber H & R handgun, and testified that this was the weapon she first saw that night at the Genovese coal yard. She further stated that in October of 1983 she was with Blystone at the Colonial Bar in Fairchance and that Blystone gave the gun to Neil Christopher and Neil left the bar with it. (TT-14-B-15-B)

Eugene Tedrow testified that he was an employee of Genovese Coal Company and that he was so employed by them in July of 1983, that he had at the Genovese coal yard a .22 caliber pistol, serial number AN 23544, and he had seen the gun in the garage on a vanity table. He testified he was the night watchman, that the gun turned up missing in July of 1983, and he described the gun as a .22 caliber H & R pistol.

Neil Christopher testified he received an H & R .22 caliber handgun from Blystone when he met with him at the Colonial Bar, that Blystone requested he sell it to him, and that he did sell it to a Richard Grimm of Fairchance, Pennsylvania. He described the gun as a black handled H & R .22 caliber pistol.

Richard Grimm testified he purchased an H & R .22 caliber pistol, containing a serial number, from Neil Christopher. Grimm attempted to repair the handgun, but in effect destroyed it. Grimm stated he subsequently turned the handgun, which he purchased from Neil Christopher, over to an Officer Killinger of the Pennsylvania State Police (TT-43-45).

Corporal James L. Killinger of the Pennsylvania State Police testified that he received a .22 caliber H & R pistol, with the serial number AN 23544, from Richard Grimm. Corporal Killinger stated that the weapon was completely torn down, the barrel was missing, and the firing pin had been filed off. He further testified he took the weapon to the State Police Barracks in Uniontown, Pennsylvania.

Sergeant George R. Fayock, a Pennsylvania State Trooper, testified he is the custodial officer of all evidence that comes into the possession of the State Police at the Uniontown Barracks in Fayette County. Fayock stated that on the 19th of December, 1983, he received from Corporal James Killinger an H & R .22 caliber pistol, serial number AN 23544. The H & R .22 caliber pistol was signed out and transported to the crime lab in Greensburg by Trooper A. James Anthony. Subsequently in March of 1984 Trooper Earl Roberts transported the .22 caliber pistol from the crime lab back to the State Police Barracks where it remained in the custody of Sergeant George Fayock until it was brought to trial.

The Commonwealth traced the gun from the date it first came into the possession of Blystone through the

time it was delivered into court. It is the court's opinion that the Commonwealth has met the standard for admission of the weapon on the issue of custody.

13. THE DEFENDANT'S CASE WAS PREJUDICED WHEN THE COMMONWEALTH WITNESS, NEIL CHRISTOPHER, REFERRED TO THE .22 CALIBER HANDGUN AS THE "MURDER WEAPON."

As to the contention of Blystone that he was prejudiced by the characterization of the weapon as "the murder weapon," this contention is without merit. On direct examination by the Commonwealth, the Commonwealth witness, Neil Christopher, testified as follows:

"Q He had a gun with him?

A Yes, it was with him that evening, yes.

Q Did he show it to you?

A Yes.

Q Why did he show it to you?

A He wanted to sell the murder—or the weapon."  
(TT-38)

At this point trial counsel made an objection. The court sustained as to any characterization of the weapon.

No further reference was made to the weapon as the "murder weapon" from any other witness throughout the trial.

The Court is of the opinion that this did not in any way affect the outcome of the trial and, if prejudicial, it was so minimal that it cannot form the basis of consideration for a new trial.

14. THE DEFENDANT'S CASE WAS HIGHLY PREJUDICED WHEN COMMONWEALTH WITNESS, JACQUELINE GUTHRIE, TWICE REFERRED TO DEFENDANT'S CRIMINAL RECORD.

15. THE REFERENCE BY THE COMMONWEALTH WITNESS TO THE DEFENDANT'S CRIMINAL RECORD IMPROPERLY TAINTS THE DEATH SENTENCE DETERMINATION BY THE JURY.

16. THE DEFENDANT, BLYSTONE, WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO MAKE A MOTION IN LIMINE TO REQUIRE THE COURT AND PROSECUTION WITNESSES TO AVOID ANY MENTION OF BLYSTONE'S PRIOR CRIMINAL RECORD; BY TRIAL COUNSEL'S FAILURE TO OBJECT AND REQUEST CAUTIONARY INSTRUCTIONS WHEN THE WITNESS MENTIONED AND IMPLIED THE EXISTENCE OF BLYSTONE'S PRIOR CRIMINAL RECORD; AND BY THE FAILURE OF TRIAL COUNSEL TO MOVE FOR A MISTRIAL WHEN THE REFERENCES OF BLYSTONE'S CRIMINAL RECORD WERE ELICITED BEFORE THE JURY.

During the trial, Jacqueline Guthrie, one of the prosecution's main witnesses, responded to the direct examination of the District Attorney as follows: (TT-17-B)

"Q Did you yourself carry that weapon?

A A couple of times.

Q Why did you carry it?

A Because he was on parole and he told me to carry it.

MR. WHITEKO: I am going to object to that, your Honor. May we approach the bench?

SIDEBAR CONFERENCE:

MR. WHITEKO: We object to the testimony with regard to his parole.

JUDGE ADAMS: We will sustain. Don't make reference to his being on parole.

MR. SOLOMON: She told me before that she carried the gun because Scott told her to carry it. I did not expect that answer. She told me that Scott told her to carry it and she was afraid of him and that is what I thought she would say.

END OF SIDEBAR

JUDGE ADAMS: You may restate your question."

The relevant part of the testimony of the witness, Guthrie, during cross-examination by trial counsel, is as follows: (TT-25-B)

"Q How long have you known Scott Blystone?

A Do you mean how long have I known him?

Q Yes.

A About six years.

Q How did you meet him?

A I met him through his sister.

Q How long had you been dating him?

A Since he came out of prison in—

Q How many years?

A A year and a half or two years."

The court would note that Guthrie's reference to Blystone having been in jail was not in response to a question asked by the Commonwealth, as indicated by post-trial counsel, but rather was in response to a question asked by defense trial counsel during cross-examination of Jacqueline Guthrie.

The general rule in this Commonwealth is that the testimonial reference which indicates to the jury that the accused has been involved in prior criminal activity is

prejudicial. This is not to say that all references which may indicate prior criminal activity warrant reversal. *Commonwealth vs. Nichols*, 485 Pa. 1, 4, 400 A.2d 1281, 1282 (1979). In the case of *Com. vs. Gaerttner*, 335 Pa. Super. 203, 228, 484 A.2d 92, 106 (1984), the court stated:

"Although there is no per se rule concerning the admission of evidence pertaining to prior convictions, certain principles may be distilled from the cases. Reference to a criminal defendant having been in jail clearly and unmistakably indicates a prior criminal conviction and the remark is prejudicial. When such a remark is introduced, a mistrial need not necessarily be granted as there are other factors to satisfy the requirement that the appellant receive a fair trial. A crucial consideration is whether the remark was intentionally elicited by the Commonwealth. A corollary to this is whether the answer is responsive to the question asked. In addition, the question of whether curative instructions were given is of great impact. Chief Justice Nix, in the case of *Commonwealth vs. Williams*, 470 Pa. at 178, 368 A.2d at 252, stated that although we reiterate the admonition to trial courts and prosecutors that they should exercise every possible precaution against the introduction of improper references to prior unrelated criminal activities of the accused, we nevertheless recognize that there will be situations where, even with the greatest care, such evidence may inadvertently impregnate a trial."

In the initial response by Guthrie on direct examination that Blystone was on parole was not in response to any question by the Commonwealth intended to elicit such a response. The District Attorney stated that he did not expect that answer. The witness, Guthrie, had told the District Attorney previously that she was afraid of Blystone and that is what the District Attorney thought she

would say as to the reason she was carrying the gun. That answer did not specifically state that Blystone was in jail, but to jurors familiar with the term "parole" it would indicate prior criminal conduct.

The reference by the witness, in response to the question of trial counsel on cross-examination, would indicate Blystone had been in jail and that Guthrie had been dating Blystone since he was released from jail.

The court believes that, although this is prejudicial, it was not so prejudicial as to warrant a new trial. The error is harmless in light of the overwhelming evidence of the defendant's guilt presented by the Commonwealth. See *Commonwealth vs. Story*, 476 Pa. 391, 412, 383 A.2d 155, 166 (1978); *Commonwealth vs. Weakland*, 273 Pa. Super. 361, 369, 417 A.2d 690, 694, accord, *Schneble vs. Florida*, 405 U. S. 427, 430, 92 S. Ct. 1056, 1059, 31 L. Ed. 2d 340, 344 (1972).

There is no merit in the defendant's contention that the reference as discussed herein to prior criminal activity in any way tainted the death sentence determination of the jury.

Neither the Commonwealth nor the defense made any reference at all to any prior criminal activity on the part of the defendant during the sentencing stage of the trial. The jury found that the death occurred in the commission of the felony of robbery and found no mitigating circumstance.

The jury, in accordance with law, once having made a finding of the death occurring in the commission of the felony of robbery and no mitigating circumstances, had no alternative but to return the death penalty.

As to the issue of ineffectiveness of counsel, Blystone contends that he was denied the right to effective assistance of counsel by trial counsel's failure to make a motion in limine to require the prosecution witnesses to avoid any

mention of Blystone's prior criminal record. In retrospect, it would be more desirable to have done that. The Court would note, however, that no reference was made to any prior criminal record. The witness did make reference to the defendant having been on parole and having been in jail. This would indicate prior criminal conduct on the part of Blystone but, as previously stated, the error was so slight, in view of the overwhelming evidence presented by the Commonwealth of defendant's guilt, that its introduction would not warrant a new trial. It therefore follows that trial counsel's failure to request such an instruction does not constitute ineffectiveness of counsel so as to require the Court, in good conscience, to grant a new trial.

Post-trial counsel further contends that trial counsel was inadequate for failing at that time to seek cautionary instructions or to move for a mistrial. Although trial counsel did not request the court to make any curative instructions to the jury, this does not of itself constitute inadequacy. Where it appears that an explanation by the witness or a curative instruction by the court would dispel any improper inference from an ambiguous remark, defense counsel has the obligation to make a choice either to ask for an explanation of instruction or to disregard the comment so as not to draw attention to it.

Certainly further explanation from the witness could only be damaging to Blystone and could not, in any way, be helpful.

The potential prejudice from the remark was slight and unlikely to have any impact on the jury during the course of the trial. A cautionary instruction may have merely emphasized the remark in the minds of the jury. See *Commonwealth vs. Weakland*, supra.

The standard for evaluating counsel's ineffectiveness has been articulated many times by our Appellate Court. The test is whether the particular course chosen by coun-

sel had some reasonable basis designed to effectuate his client's interest. Although weigh the alternatives we must, the balance tips in favor of a finding of effective assistance as soon as it is determined that trial counsel had any reasonable basis. *Commonwealth ex rel, Washington vs. Maroney*, 427 Pa. 599, 604, 235 A.2d, 349, 352 (1967); *Commonwealth vs. Mott*, 278 Pa. Super. 332, 335, 336, 420 A.2d 567, 568 (1980).

As to the issue of inadequacy for failing to move for a mistrial, trial counsel's conduct would only have been inadequate if the action would bring about a different result. In this particular case, had the motion for mistrial been sought following the statements of the witness, Guthrie, in response to the question by the Commonwealth, or the response to the question by the defense, the motion would have been denied. The court can see no rational basis to require the granting of a mistrial had such a motion been made.

17. BLYSTONE WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO PROPERLY INVESTIGATE THE EXISTENCE AND POSSIBLE TESTIMONY OF BLYSTONE'S ALIBI WITNESSES, AND TRIAL COUNSEL'S FAILURE TO CALL ANY ALIBI WITNESSES ON BLYSTONE'S BEHALF DESPITE TRIAL COUNSEL'S KNOWLEDGE OF THE SAME.

The court would first note that the defense did not notify the Commonwealth prior to trial of any intended "alibi defense," as required by Rule of Criminal Procedure 305-C(1)(a)(d). Disclosure by Blystone under this rule is mandatory and is as follows:

"(a) Notice of Alibi Defense: A defendant who intends to offer the defense of alibi at trial shall, at the time required for filing the omnibus pretrial

motion under Rule 306, file of record notice signed by the defendant or the attorney for the defendant, with proof of service upon the attorney for the Commonwealth, specifying intention as to the place or places where the defendant claims to have been at the time of the alleged offense and the names and addresses of witnesses whom the defendant intends to call in support of such claim.

(d) Failure to File Notice: If the defendant fails to file and serve notice of alibi defense or insanity or mental infirmity defense as required by this rule, or omits any witness from such notice, the court at trial may exclude the testimony of any omitted witness, or may exclude entirely any evidence offered by the defendant for the purpose of proving the defense, except testimony by the defendant, or may grant a continuance to enable the Commonwealth to investigate such evidence, or may take such other order as the interests of justice may require.

The court in *Commonwealth vs. Fernandez*, 333 Pa. Super. Ct. 279, 289-290, 482 A.2d 567, 571-572 (1984), discussed the issue of whether it was proper for the court to exclude alibi testimony where a defendant failed to notify the Commonwealth of his intent to call alibi witnesses. There, as here, Blystone had ample opportunity to advise the Commonwealth of the alibi defense, and failed to do so.

Rule 305 addresses the delicate balance between the interest of the accused in presenting a full and complete defense and the interest of the Commonwealth in avoiding fabricated alibis, unfair surprise, and the inevitable delay of justice wrought by an "eleventh-hour defense." See *Williams vs. Florida*, 399 U.S. 78, 81-82, 90 S. Ct. 1893, 1895-1896, 26 L. Ed. 2d 446, 450 (1970).

Blystone maintains that trial counsel was ineffective for failing to interview and call Sharon Smitley, Donald

Smitley, Kathryn LaRue, Mary Kathryn Powell, and Bonnie Gibbs.

Blystone did not notify his defense counsel of the alibi witnesses until the Commonwealth had closed its case. Prior to this time, Blystone did not give any indication to his counsel that there were persons who could establish his presence elsewhere at the time the crime was committed.

At the hearing held to determine whether trial counsel was inadequate, Blystone, in open court, waived the rule of confidentiality between attorney and client. Trial counsel then testified that the testimony of the alibi witnesses would be contrary to the facts recited to him by the defendant, Blystone.

Trial counsel advised Blystone he would not be a party to any action that could possibly result in perjury.

In summary, trial counsel did not attempt to call the alibi witnesses or to interview them because of the late notification, the fact that their testimony would not be relevant, and the purpose for which they were being called would be inconsistent with the statements made by Blystone to trial counsel.

The court would further note that at the close of the Commonwealth's case, in the absence of the jury, trial counsel indicated to the court that Blystone was going to rest and that Blystone had elected to remain silent.

The court conducted a colloquy with Blystone and Blystone's trial counsel concerning his right to testify or to remain silent.

In the court's judgment, Blystone understood his rights and elected not to testify, voluntarily and intelligently, and elected not to call any witnesses. He did not in any way indicate to this court that there were witnesses available he could call in his defense.

Of those persons whom Blystone alleged he could call as witnesses, only Sharon Smitley testified at the hearings held to determine ineffectiveness of counsel. Her testimony was very inconclusive, in the court's judgment, and if it had been offered at trial, it would not in any way have established an alibi for Blystone. She was unable to establish to any degree of reasonable certainty the time Blystone was in attendance at her party.

On cross-examination she stated she did not remember what day of the week this was, whether it was Tuesday, Friday or Saturday. She further testified that she could not state with certainty what time Blystone arrived or the time he left. (A-79-93)

The Commonwealth called Cheryl Tkocs, the court stenographer who took the trial of George Powell, a defendant who was also charged with the homicide of Smith-burger, and she testified from her stenographic notes that Sharon Smitley had responded to the question: "How long were George, Scott and Jackie at your party?" "I would say about an hour or so." (T-100-102)

The other persons named by Blystone as alibi witnesses did not testify at the hearing on ineffectiveness of counsel. The court cannot speculate as to what their testimony would have been had they been present at the trial. Therefore, as to those witnesses, the court must find that Blystone failed to prove their testimony would have been beneficial to his case had they been called as witnesses.

It is the court's judgment that Blystone was fabricating an alibi that was totally unsupported.

Under the circumstances of this case, the failure to establish an alibi defense, if one was available (and the court has stated it does not believe it was), was not that of counsel but that of Blystone. Blystone cannot expect to wait until the Commonwealth closes its case and then advise his counsel, for the first time, of witnesses to be interviewed and called.

The court also, as previously stated, finds as a fact that Sharon Smitley is not a credible witness, that her testimony in the face of the overwhelming testimony of guilt presented by the Commonwealth, would have been meaningless.

Therefore, the court finds that trial counsel was not ineffective for failing to interview or call alibi witnesses for Blystone.

**18. THE DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE BY TRIAL COUNSEL'S FAILURE TO PROPERLY PREPARE THE CASE FOR TRIAL AND FAILURE TO PROPERLY INTERROGATE WITNESSES DURING THE COURSE OF THE TRIAL.**

Blystone maintains that trial counsel did not adequately prepare for trial.

Blystone testified at the hearing on inadequacy of counsel that trial counsel had only seen him three or four times for a total of "maybe two hours" prior to trial.

Trial counsel, Jeffrey W. Whiteko, a reputable lawyer at this Bar, maintains a record of the occasions he had made contact with Blystone concerning preparation for trial. These records established that Whiteko met with Blystone on numerous occasions and that he spent a great deal of time, in addition to the interviews with Blystone, reviewing statements and other documentation. (T-50 through 53)

The court feels that trial counsel spent ample time in preparation of the defense and did all that could be reasonably required of him in preparing the case for trial.

As to the allegation of Blystone that trial counsel failed to properly interrogate witnesses during the course of the trial, the court finds that this is totally without merit. There is no evidence to support this allegation.

Therefore, the court finds that Blystone was not denied his right to effective assistance of trial counsel.

**19. THE DEFENDANT, BLYSTONE, WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO PURSUE THE COMMONWEALTH'S OFFER OF A PLEA BARGAIN OF LIFE IMPRISONMENT.**

The court finds that the allegations of Blystone that trial counsel was ineffective for failure to pursue a plea bargain offer of life imprisonment is totally without merit.

Trial counsel, as well as Alphonse P. Lepore, Jr., the Public Defender, discussed with Blystone the offer of the Commonwealth of a plea bargain of life imprisonment. It was recommended by trial counsel that he accept the plea bargain, but Blystone refused. Blystone did not want to accept the plea bargain because of his belief that the incriminating tape-recording would be suppressed, and he did not want to waive any of his rights. Further, Blystone did not want to do back-up time for his other crimes. He stated he would be an old man when he got out. The failure to accept the plea bargain was solely the determination of Blystone against the recommendation of his trial counsel.

Blystone cannot now allege ineffectiveness for trial counsel's failure to further pursue it in view of the position of Blystone.

**20. WAS THE DEFENDANT'S RIGHT TO A JURY CONSISTING OF A FAIR CROSS-SECTION OF THE COMMUNITY, AS GUARANTEED BY THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS, DENIED BECAUSE THE TRIAL COURT ALLOWED THE PROSECUTION TO CHALLENGE FOR CAUSE THOSE POTENTIAL JURORS WHO HAD CONSCIENTIOUS, MORAL, OR RELIGIOUS RESERVATIONS ABOUT IMPOSING THE DEATH PENALTY?**

21. WAS THE DEFENDANT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO ATTEMPT TO REHABILITATE JURORS WHO EXPRESSED RESERVATIONS CONCERNING THE IMPOSITION OF THE DEATH PENALTY?

In all, five jurors out of ninety-six subjected to voir dire in this case were excused for cause upon challenge by the Commonwealth by reason of their responses to questions concerning the imposition of the death penalty?

This court is of the opinion that it is necessary to review the questions submitted to the jurors, and their responses in their entirety on this issue in order to determine whether the excused for cause was in order.

Juror number 102—Hattie M. Royster—was asked the following questions by the Commonwealth and made the following responses:

“Q If, after hearing all of the evidence in this case, you believed the defendant to be guilty of murder in the first degree, would you return such a verdict?

A Yes.

Q If, after hearing all of the evidence in this case and the law as his Honor, Judge Adams, will give you, and as a member of this jury you believed that the death penalty is warranted, would you impose such a penalty?

A Does that mean ‘capital punishment?’ I don’t believe in that.

Q That is the death penalty. Do you have a moral or religious belief against capital punishment?

A I am a Baptist and I don’t believe in capital punishment.

Q It is against your religious beliefs to support capital punishment?

A Yes, it is.”

(TT-juror 102—page 2)

At this point the Commonwealth challenged for cause. The defense counsel objected. The court overruled the objection without any further questions and excused the juror for cause. At the time juror number 102 was excused for cause, the Commonwealth had all twenty peremptory challenges remaining<sup>1</sup>

The standard in determining whether a juror should be excused for cause as it relates to the imposition of the death penalty is set forth in *Commonwealth vs. Datesman*, — Pa. Super. —, —, 494 A.2d, 413, 417, 418 (1985) as follows:

“Whether a juror’s views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”

*Datesman* cites *Witherspoon vs. Illinois*, 391 U. S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968); *Wainwright vs. Witt*, 469 U. S. —, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985); and *Adams vs. Texas*, 448 U. S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980).

This court, as to Juror Number 102—Hattie H. Royster—had no difficulty in reaching the decision that her attitude and manner, as well as her words, indicated she had personal and religious beliefs which would prevent and substantially impair her performance and duty as a juror in accordance with the court’s instructions and her oath. It is conceded that the court’s dismissal for cause was abrupt, and that more extensive questioning would have placed an Appellate Court in a better position to resolve

<sup>1</sup> In fact, during the entire voir dire the Commonwealth only exercised ten peremptory challenges out of the twenty allocated.

the issue so far as the printed record is concerned, but this court is clearly of the opinion, based on the printed record as shown, and the attitude and manner of the juror as this court found it to be, that she did not meet the standards set forth and and was properly excluded from the jury for cause.

Juror number 120—Mary B. Slavic—was asked the following questions and made the following responses:

“Q If, during this trial, you were placed in the position to make a determination on the death penalty and you were against or could not find for the death penalty, would you be swayed by any other members of the jury?

A No; I have certain principles and ideals about the death penalty myself.

MR. WHITEKO: The defense will accept this juror, your Honor.

JUDGE ADAMS: The Commonwealth may inquire.

EXAMINATION BY MR. SOLOMON:

Q You said you have certain ideals and principles concerning the death penalty. Do you have any religious, moral, or conscientious scruples against the death penalty?

A Yes, I do.

Q Under any circumstance could you return a verdict that would impose the death sentence?

A No.

Q Under no circumstance?

A Under no circumstance.

MR. SOLOMON: Challenge for cause, your Honor.

JUDGE ADAMS: We would grant the challenge. This means that you would not be asked to serve on this jury. We would ask that you not dis-

cuss with any other juror the questions you were asked, your responses, or your reason for not serving on this jury. Thank you. You may step down.

(TT—juror number 120—page 5)

Juror number 16—Mario S. Capotosto—was asked the following questions and made the following responses:

“Q Do you know of any reason why you should not or could not serve on this jury?

A At the present time, I don't. I may have some reason. It depends on what this is all about.

Q What do you mean by that?

A Is this a murder case?

Q Yes.

A Is there going to be a capital punishment imposed in case it has to be?

Q That may come under consideration.

A I don't believe in that. I don't believe in taking someone else's life.

Q Then you have a conscientious, moral, or religious scruple against the death penalty?

A I have.

Q Under any circumstance could you impose the death penalty?

A I would not impose the death penalty.

Q Regardless of the circumstances?

A Regardless.

MR. SOLOMON: The Commonwealth would challenge for cause.

JUDGE ADAMS: Mr. Capotosto, we would excuse you. I appreciate your honest explanation. Please do not tell any other juror why you were

excused or tell them any questions you were asked or your responses.

MR. CAPOTOSTO: I won't.

(TT—juror 16—pages 6-7)

Juror number 153—Carol Gowatski—was asked the following questions and made the following responses:

"Q If, after hearing all of the evidence in this case and taking the law as given to you by Judge Adams, you believe the defendant to be guilty of murder in the first degree, would or could you render such a verdict?

A Yes, sir, unless it was the death penalty.

Q Do you have any conscientious, moral, or religious scruples against the death penalty?

A I really don't think I could vote for the death penalty.

Q Under any circumstances, could you vote for it?

A No, sir.

MR. SOLOMON: The Commonwealth would challenge for cause, your Honor.

JUDGE ADAMS: We would grant the challenge. We would excuse you from further service on the jury. I wish to thank you very much for coming in on such short notice. When you leave, and you may leave now, please stop at the Clerk's Office and sign your pay voucher so that you can get paid for today's service.

(TT—juror 153—pages 8-9)

Juror number 158—Frances Page—was asked the following questions and made the following responses:

"Q If, after you have listened to all of the testimony and the Court has given you the law to apply to the evidence that you heard from the testi-

mony, you believe this defendant to be guilty of murder in the first degree beyond a reasonable doubt, would you return such a verdict?

A No, I don't think I could—my religious beliefs—I don't believe in capital punishment or anything like that.

Q You have religious scruples against the death penalty?

A It is my own individual belief.

Q Under any circumstance could you return a verdict involving the death penalty?

A I couldn't. My conscience would affect me in such a way that I could not serve.

Q Regardless of the evidence you would hear in this case?

A Regardless. It wouldn't be fair if I would serve.

MR. SOLOMON: The Commonwealth would challenge for cause, your Honor.

JUDGE ADAMS: We would excuse you. We appreciate very much your coming in on such short notice, and we appreciate your honesty. Would you please turn in your badge and then go to the Clerk's Office so that you can be compensated for today's service.

(TT—juror 158—pages 10-11)

A review of the testimony of these jurors clearly shows that their exclusion for cause was proper.

There is no merit in Blystone's contention that trial counsel was ineffective because he did not object to jurors numbers 120, 16, 153, and 158 being excused for cause, or attempting to rehabilitate them, since their exclusion for cause was fully justified on the record, and any objections by Blystone would not have altered the situation.

As to juror number 102, trial counsel did object to the court excusing that juror for cause, and preserved that issue for appeal.

22. DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S MOTION FOR A POST-TRIAL EVIDENTIARY HEARING TO PRESENT TESTIMONY CONCERNING THE PROSECUTION PRONENESS OF THE JURY THAT CONVICTED HIM?

Blystone in his petition dated July 3, 1985, through his post-trial appointed counsel, requested this court to hold a hearing in order to present testimony regarding the prosecution proneness of a death qualified jury.

The evidence sought to be presented by Blystone was not specifically directed to any of the twelve jurors who were selected to sit on this jury, but rather to studies of jurors in general to establish that the "death qualification" of the jury had produced a "prosecution prone" jury.

This concept has not been judicially accepted by any Appellate Court in this Commonwealth and for very good reason. The Pennsylvania Supreme Court in *Commonwealth vs. Szuchon*, 506 Pa. 228, 258 n. 13, 484 A.2d 1365, 1381 n. 13 (1985), in a footnote stated:

"That the data remains too tentative and fragmentary to permit an appellate court to judicially notice that 'death-qualified' juries are impermissibly prosecution-prone is demonstrated by the fact that, of the reported cases that have exhaustively analyzed the data following full evidentiary hearings, our research has discovered only one case in which a conviction has been overturned on the basis of that date. *Grigsby vs. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983), on remand from Eighth Circuit, 637 F.2d 525 (8th Cir. 1980). But cf. *Keeten vs. Gar-*

*rison*, 742 F.2d 129 (4th Cir. 1984) reversing the decision of the Federal District Court; *Spinkellink vs. Wainwright*, 578 F.2d 582 (5th Cir. 1978); *Hovey vs. Superior Court of Alameda Co.*, 28 Cal. 3d 1, 168 Ca. Rptr. 128, 616 P.2d 1301 (1980)" *Id.* at 258, 484 A.2d at 1381, n. 13.

The Superior Court in *Commonwealth vs. Datesman*, — Pa. Super. —, —, 494 A.2d 413, 417 (1985), affirmed that more recent opinions have not altered the status of the law in Pennsylvania.

For the reasons stated herein, this court rejects Blystone's position that a new trial should be granted for the reason that the jury was "prosecution prone."

23. DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL BECAUSE OF TRIAL COUNSEL'S FAILURE TO USE A PEREMPTORY STRIKE TO ELIMINATE BEVERLY BATTAGLINI FROM THE JURY AFTER THE DEFENDANT'S CHALLENGE FOR CAUSE AS TO SAID JUROR WAS DENIED.

During voir dire, Juror Number 152, Beverly Battaglini, responded to the question concerning employment by any police or investigatory agency that her husband was a District Justice serving in Brownsville. During individual voir dire, which was rather lengthy, Mrs. Battaglini responded to questions of trial counsel as follows:

"Q If Mr. Blystone elected not to present any witnesses or testimony but relied solely on the evidence presented by the Commonwealth and cross-examination, would you feel this would be evidence of guilt?

A You mean if he didn't provide anybody to come forward to testify?

Q Yes.

A I think I would.

Q As Judge Adams stated, he has that right to remain silent.

A Yes.

Q Do you feel at this time that he should present evidence on his behalf?

A Yes, I do.

MR. WHITEKO: Challenge for cause, your Honor.

JUDGE ADAMS: Mrs. Battaglini, we would first ask you—do you understand that he has no burden to provide any evidence?

A Yes.

JUDGE ADAMS: Would you feel if he didn't, that would be evidence of his guilt?

A You would only be hearing one side and that would be the State of Pennsylvania's side.

JUDGE ADAMS: That is correct, you would have to decide strictly on what the Commonwealth presented, and that is what the law is. The Commonwealth has to prove his guilt. He has no burden to prove anything, so if he offered no evidence what would you do?

A If he offered nothing I would weigh what the Commonwealth was telling me and I would judge from what they have told me whether he was guilty or not guilty.

JUDGE ADAMS: That is all we would ask. Now, if, if the Commonwealth presented their case and the defendant offered no evidence or testimony at all, how would you feel?

A If I felt the Commonwealth presented enough of a case to find him guilty, I would feel that he was guilty.

JUDGE ADAMS: Let's suppose you found that the Commonwealth did not present enough evidence, in your judgment, to convict the man, would you feel that the fact that the defendant did not offer any evidence or testimony that he was guilty anyway?

A No, I wouldn't go along with it. I would say he was not guilty. This is a man's life we are dealing with. This is the way I feel.

JUDGE ADAMS: I don't believe the juror understood the questions. We would deny the motion for cause."

(TT—juror 152—pgs. 22-23)

After further questioning by trial counsel and after Mr. Whiteko conferred with Mr. Blystone, the defendant accepted the juror. Following interrogation by the Commonwealth, the Commonwealth accepted the juror and she was then selected to serve. No further reference was made to this juror at any time during the trial.

Blystone now maintains that it was ineffective assistance of counsel for failure to exercise a peremptory challenge with regard to this juror.

At the hearing held for the purpose of determining inadequacy of counsel, Blystone admitted that he agreed to the acceptance of the juror but did so rather grudgingly. The court finds as a fact that the juror was retained at the insistence of Blystone.

Trial counsel was of the opinion that the juror would not be a bad juror. He thought from interviewing her that she would be an honest juror, would listen to the evidence, and render a true and just verdict.

Blystone was well aware that the juror was the wife of a magistrate. This was discussed with him by trial counsel.

It was a matter of judgment as to whether the juror should be left on or stricken. Apparently Blystone, who wanted her on the jury initially, changed his mind the following day and asked that the juror at that time be challenged peremptorily. Trial counsel properly advised Blystone that he could not do so because once having been accepted, she would not be dismissed from the jury except for cause. There was no cause demonstrated at any time for which Blystone could have excluded her from the jury panel. Therefore, the action of trial counsel was not inadequate as it relates to the selection of the juror.

24. DOES THE PENNSYLVANIA DEATH PENALTY SENTENCING STATUTE VIOLATE THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT BECAUSE THE STATUTE DEFINES AGGRAVATING CIRCUMSTANCES IN AN OVERBOARD AND ARBITRARY FASHION?

25. DOES THE USE OF THE WORD "MUST" IN THE PENNSYLVANIA DEATH PENALTY STATUTE RENDER SAID STATUTE UNCONSTITUTIONAL UNDER BOTH THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS BECAUSE IT IMPROPERLY LIMITS THE FULL DISCRETION THE SENTENCER MUST HAVE IN DECIDING THE APPROPRIATE PENALTY.

In *Commonwealth vs. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937 (1982), the Pennsylvania Supreme Court thoroughly addressed the very issues concerning the constitutionality of Section 9711 of the Sentencing Code raised by Blystone in the instant case.

In *Zettlemoyer*, the appellant was charged with and convicted of first degree murder, and in a separate hear-

ing received the death sentence. Following the denial of the post-conviction motions, the case was automatically appealed to the Pennsylvania Supreme Court pursuant to 42 Pa. C.S.A. Sections 9711(h)(1) and 722(4). The Supreme Court affirmed the appellant's conviction for murder of the first degree, affirmed the sentence of death, and upheld the constitutionality of Section 9711 of the Sentencing Code under both Federal and State Constitutions.

Significantly, the court in *Zettlemoyer* found that juries in Pennsylvania are not mandated to impose the death penalty in all cases of murder of the first degree, and are not left without guidelines in the determination of whether to impose death or life imprisonment. *Commonwealth vs. Zettlemoyer*, supra, at 71, 454 A.2d at 966.

Under 42 Pa. C.S.A. Section 9711(c)(1)(iv) the jury may only return a sentence of death in two distinct situations:

"The verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases."

9711(c)(1)(v) provides:

"The court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment."

This requirement that the jury's decision of the death sentence be unanimous, together with the provision that

the defendant receive life imprisonment if a unanimous verdict cannot be reached, provides an important safeguard for a defendant convicted of murder of the first degree.

Similarly, the provision for automatic appellate review, pursuant to Section 9711(h)(1), is a very important factor in a constitutionally permissible legislative scheme for imposition of the death penalty. Such a review is a "last line of defense" to guard against arbitrary sentencing by a jury. *Commonwealth vs. Zettlemoyer*, 500 Pa. at 60, 454 A.2d at 960.

Blystone in the instant case argues that the Death Penalty Statute is arbitrary, unreliable, and limits juror discretion. More specifically he argues that the statute does not provide for sufficient consideration of mitigating circumstances. In *Zettlemoyer* the Supreme Court noted that the Pennsylvania Legislature, by enacting Section 9711 of the Sentencing Code, responded to the announcements of the court in *Commonwealth vs. Moody*, 476 Pa. 223, 382 A.2d 442 (1977) and of the United States Supreme Court in *Lockett vs. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). The deficiency identified in those cases was the failure to permit the jury to consider a sufficiently broad spectrum of circumstances relating to both the character of the offender and the offense with which he is charged.

Section 9711(e) cured this deficiency by providing the jury with a wide range of seven specific mitigating circumstances which they may consider and, additionally, "(a)ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." 42 Pa. C.S.A. Section 9711(e)(8). *Commonwealth vs. Zettlemoyer*, 500 Pa. at 57, 454 A.2d at 958-59. Jury discretion is thus neither eliminated nor unduly limited, but rather is channeled in order to en-

sure that the death penalty will be imposed in a consistent and rational, as opposed to an arbitrary and capricious, manner.

26. SHOULD THE TRIAL JUDGE HAVE PERMITTED TRIAL COUNSEL TO INTRODUCE EVIDENCE TO ESTABLISH MITIGATING CIRCUMSTANCES ALTHOUGH THE DEFENDANT WAS OPPOSED TO OFFERING ANY EVIDENCE OF MITIGATION?

Blystone maintains that the trial judge should have permitted defense counsel to introduce evidence to establish mitigating circumstances although Blystone was inalterably opposed to offering any evidence of mitigating circumstances either through his own testimony or by any other witnesses.

This trial was unusual in that Blystone not only did not offer any testimony during the innocence or guilt phase of the trial but refused to offer any testimony on his own behalf or permit defense counsel to offer any testimony of other witnesses on his behalf in the penalty stage of the proceeding.

Following the finding of guilty of murder in the first degree, and prior to the sentencing phase, trial counsel advised the court that, after lengthy discussions with Blystone, and over trial counsel's strenuous objections, Blystone stated he wished to offer no evidence. Trial counsel indicated he had interviewed Blystone's parents on several occasions and that he wished to put them on the stand and also wished to put Blystone on the stand, but after two hours of discussion with him, Blystone still remained adamant in his position that he did not want any testimony offered on his behalf during the sentencing phase of trial. At this point the court extensively advised Blystone of the procedure that would follow dur-

ing the sentencing phase of the trial and that Blystone had the burden of proving by a fair preponderance of the evidence mitigating circumstances that would prohibit the imposition of the death penalty by the jury in the event the Commonwealth would prove beyond a reasonable doubt the presence of aggravating circumstances. The court explained to Blystone that if the jury found the murder was committed in the commission of a robbery that this would be an aggravating circumstance, and if there were no mitigating circumstances the jury must impose the death penalty.

After this colloquy, Blystone consulted with his trial counsel. Trial counsel then stated that Blystone wanted to know if his failure to testify or to offer any evidence during the sentencing phase of the trial would affect his right to appeal from any finding by a jury of murder in the first degree or the penalty that would be imposed. The court explained to Blystone that it would not affect his right of appeal from the conviction or the imposition of sentence, but that he could not raise as a defense to the imposition of the sentence that no testimony was offered on his behalf, and that he would be waiving that right.

The court again stated to Blystone—"do you wish to testify yourself or to have your parents testify or to offer any other evidence in this case? You had better think very carefully before you answer that question. I would tell you that I am not insisting that you testify—don't misunderstand me—because whatever decision you make I am going to abide by, but I just want to make sure that you fully understand what you are doing because tomorrow you cannot change your mind. I would ask you to consult with your counsel one more time, and then after consulting, tell me what you want to do and we will respect your wishes." Following this Blystone consulted with his counsel and, upon inquiry by the court

—"what is your decision, Mr. Blystone?", he replied, "I have no testimony and no witnesses," to which the court stated "either through yourself or anyone else?", and Blystone's answer was "no." (TT-140-144)

The court inquired of Blystone if he was taking any narcotics or medications of any kind that might affect his reasoning and Blystone stated that he was not.

The court determined, and so stated on the record, that the court found Blystone to be an intelligent man who understood what had been explained to him and that the decision he made not to offer any testimony himself or by anyone else during the sentencing phase of the proceeding was made after careful consideration and after numerous consultations with his counsel, and that he fully understood the possible consequences of his decision not to offer any testimony.

Blystone has an absolute right to remain silent, not only during the innocence or guilt phase of the trial, but also during the sentencing phase. The court could not compel Blystone to offer any testimony in either phase of the proceedings nor could the court permit Blystone's counsel to offer testimony over the objections of Blystone.

The court cannot speculate as to what would have been the effect of testimony offered by Blystone or by other witnesses during the sentencing phase of the proceeding. Blystone, however, was given the full opportunity to present whatever evidence he wished to offer by way of mitigation. Once he exercised his constitutional right to remain silent voluntarily and with full knowledge of the consequences of his decision, he cannot now raise the objection that testimony should have been offered on his behalf over his objection.

27. THE PRESENT SITUATION DOES NOT PRESENT CIRCUMSTANCES IN WHICH THE DEATH PENALTY IS APPROPRIATE, AND ITS IMPOSITION SHOCKS ONE'S SENSE OF JUSTICE, AND SAID DEATH PENALTY SHOULD BE OVERTURNED BY THE TRIAL COURT AND A TERM OF LIFE IMPRISONMENT IMPOSED.

In the instant case the Commonwealth presented evidence to establish beyond a reasonable doubt that Blystone robbed Smithburger and then intentionally and willfully murdered him to prevent Smithburger from identifying him.

The finding by the sentencing jury that the murder occurred in the commission of the felony of robbery is an aggravating circumstance that would require the imposition of the death penalty where the jury, as here, found no mitigating circumstance.

The sentence of death was neither excessive nor disproportionate to the penalty imposed in similar cases in this Commonwealth. *Commonwealth vs. Frey*, 504 Pa. 428, 475 A.2d 700 (1984), cert. denied 105 S. Ct. 360 (1984); *Commonwealth vs. Stoyko*, 504 Pa. 455, 475 A.2d 714 (1984), cert. denied 105 S. Ct. 361 (1984); *Commonwealth vs. Morales*, — Pa. —, 4914 A.2d 367 (1985); *Commonwealth vs. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937 (1983).

After a careful review of the facts and circumstances of this case, and with the full realization of the effect of this decision, this court feels that the circumstances required, beyond a reasonable doubt, the imposition of the death penalty.

This court can find no reason to warrant setting aside the death penalty and imposing a sentence of life imprisonment.

For the reasons herein stated, the Court denied the motion for new trial and the motion in arrest of judgment by order entered March 12, 1986.

BY THE COURT,

/s/ Fred C. Adams  
J.

Attest:

/s/ Charles Baer  
Clerk

April 17, 1986

J-33-88

IN THE SUPREME COURT OF PENNSYLVANIA  
WESTERN DISTRICT

No. 37 W.D. Appeal Dkt. 1986

COMMONWEALTH OF PENNSYLVANIA,

*Appellee*

VS

SCOTT WAYNE BLYSTONE,

*Appellant*

Appeal from the Judgments of Sentence of the  
Court of Common Pleas of Fayette County,  
Criminal Division, at Nos. 2, 2 1/4, 2 2/4 & 2 3/4  
of 1984, entered on April 17, 1986

Argued: March 9, 1987

Reargued: March 7, 1988

OPINION

MR. JUSTICE McDERMOTT

Filed October 17, 1988

A jury found the appellant, Scott Wayne Blystone, guilty of murder of the first degree,<sup>1</sup> robbery,<sup>2</sup> criminal conspiracy to commit homicide,<sup>3</sup> and criminal conspiracy

<sup>1</sup> 18 Pa.C.S. §§ 2501; 2502(a).

<sup>2</sup> 18 Pa.C.S. § 3701.

<sup>3</sup> 18 Pa.C.S. § 903.

to commit robbery.<sup>4</sup> After further deliberation that same jury set the penalty for the murder conviction at death.<sup>5</sup> The appellant was also sentenced to ten to twenty years imprisonment for the robbery conviction.<sup>6</sup> He directly appeals these judgments of sentence.<sup>7</sup>

It is the practice of this Court in cases in which the death penalty has been imposed to review the sufficiency of the evidence supporting an appellant's conviction. *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 26-27 n.3, 454 A.2d 937, 942 n.3 (1982), *cert. denied*, 461 U.S. 970 (1983). We do so with an eye to see whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the jury to find every element of the crime beyond a reasonable doubt. *Commonwealth v. Kichline*, 468 Pa. 265, 361 A.2d 282 (1976). In the instant case the evidence presented to the jury, together with all reasonable inferences in favor of the Commonwealth, discloses the following.

On the night of Friday, September 9, 1983, Scott Blystone, his girlfriend and another couple were riding around Fayette County in Blystone's automobile. Blystone, who was driving, worried about the fact that his automobile was low on gasoline and he had no money with which to purchase more. At approximately midnight, Blystone observed Dalton Charles Smithburger, Jr., hitchhiking. Blystone announced to his companions: "I am going to pick this guy up and rob him, okay, . . .?" His friends endorsed the idea, or at best did nothing to oppose it, so Blystone pulled over to pick up his victim.

<sup>4</sup> *Id.*

<sup>5</sup> 42 Pa.C.S. § 9711.

<sup>6</sup> 18 Pa.C.S. § 1103(1).

<sup>7</sup> See 42 Pa.C.S. §§ 722(4); 9711(h)(1). Pa.R.A.P. 702(b).

Unfortunately, Smithburger, who was not acquainted with anyone in the car, accepted the ride.

Once underway Blystone asked Smithburger if he had any money to contribute for the purpose of purchasing gasoline. Smithburger replied that he had only a few dollars and reached into his pocket. Dissatisfied with that response, Blystone drew a revolver which he held to Smithburger's head. In no uncertain terms Blystone ordered Smithburger to shut his eyes and place his hands on the dashboard. Smithburger understandably offered no resistance. Though in the course of a taped interview he would later admit that "I almost splattered him right there in the car," Blystone assured Smithburger that he would lose only his money, not his life.

Blystone pulled the car off the road at a lonely spot and walked Smithburger at gunpoint a short distance into an adjacent field. Blystone searched Smithburger, finding thirteen dollars. He ordered Smithburger to lie face down on the ground and wait. Smithburger complied. Blystone briefly returned to his companions in the car to inform them that he was going to kill Smithburger. The best that can be said for Blystone's friends is that perhaps they were startled into ambivalence by the enormity of the statement.

In any event Blystone decided to kill Smithburger. He returned to the field where he found his victim as he had left him. Blystone knelt on Smithburger's back and asked him whether he could identify the vehicle which had picked him up. Smithburger correctly replied, "all I know is it was green and the back end was wrecked." Blystone then said, "goodbye" and emptied his revolver into the back of Smithburger's head.

Such "goodbyes" are rarely the end. Such deaths take on a life of their own and rattle through the lives of the those who know, until chance or nature loosens tongues. Appellant Blystone heard more than the voice of his pas-

sengers: he heard his own voice bragging in vivid and grisly detail of the killing of that unlucky lad. (See the Appendix attached to this opinion.)

Blystone eluded detection as Smithburger's murderer for over three months. However, his associates eventually exposed him. The testimonial evidence they contributed to the Commonwealth's case, along with physical evidence, would have been sufficient to support Blystone's convictions. Additionally, an audio tape of Blystone describing the murder to an informant was presented to the jury (See Appendix). The combined effect of all this material was to present the jury with evidence of the appellant's guilt which was more than sufficient; it was overwhelming.

Nevertheless, the appellant attacks the sufficiency of the evidence supporting his robbery conviction and, consequently, the imposition of the death penalty.\* Specifically, the appellant argues, the Commonwealth did not present sufficient evidence to satisfy the *corpus delicti* requirement for the crime of robbery. To establish the *corpus delicti* of robbery, the Commonwealth must prove a theft by criminal means. *Commonwealth v. Tallon*, 478 Pa. 468, 475, 387 A.2d 77, 81 (1978). In other words, the Commonwealth bears a burden to show that the crime actually occurred.

The Commonwealth presented ample evidence, apart from the appellant's own admissions, that Scott Blystone did in fact rob Dalton Smithburger. Both of the young women in the car that night testified that the armed appellant took thirteen dollars from Smithburger. One of the women testified on this point as follows:

\* The only aggravating factor the jury found to exist for purposes of setting the penalty at death was the fact that Blystone killed Smithburger during the course of a felony, i.e., robbery. 42 Pa.C.S. § 9711(d)(6). Thus, the death penalty cannot stand should the robbery conviction fall.

Q. [Prosecutor]: Did Scott say whether or not he took the money?

A. He didn't have no money on him before and that is how he got the gas is with that money.

Q. With that thirteen dollars?

A. With that thirteen dollars . . .

Thus the appellant's argument on this point is meritless.<sup>9</sup>

Apart from the sufficiency of the evidence supporting this robbery conviction, the appellant asserts a second theory which would render this felony harmless for the purpose of setting the penalty for his murder conviction. Blystone argues that the robbery of Smithburger was completed prior to the murder and since the killing was not committed "while in the perpetration of a felony," 42 Pa.C.S. § 9711(d)(6), he cannot be sentenced to death.<sup>10</sup> This proposition is absurd.

The crime of robbery is clearly defined:

(1) A person is guilty of robbery if, in the course of committing a theft, he:

(i) inflicts serious bodily injury upon another;

(ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury;

(iii) commits or threatens immediately to commit any felony of the first or second degree;

(iv) inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury; or

<sup>9</sup> The appellant also asserts that trial counsel was ineffective for failing to argue and preserve any *corpus delicti* issue relating to the robbery conviction. Since we have addressed the substance of the *corpus delicti* issue in our review of the sufficiency of the evidence, we will not consider the ineffectiveness claim.

<sup>10</sup> See note 8, *supra*.

(v) physically takes or removes property from the person of another by force however slight.

(2) An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission.

18 Pa.C.S. § 3701(a).

The evidence concerning the robbery and killing was uncontroverted. The appellant searched his victim at gunpoint, taking thirteen dollars; forced him to lie down; and instructed him not to move unless he wished to die. Blystone then traversed the short distance to his automobile, remaining there only long enough to announce his murderous intent and gain the endorsement of his companions. Meanwhile, Smithburger remained motionless on the ground out of fear that Blystone would fulfill his deadly promise should he resist or attempt to flee. Indeed, Blystone described in detail how he instilled doubt in Smithburger's mind as to whether his robber was merely a few feet away or fled the scene: "He never moved. He thought I was there. I stepped around him, right, and I walked a little bit in a circle and I stopped. I didn't make no noise, and I said 'don't think I am gone, mother-f---r,'" and then I f--- tiptoed off, you know." Upon his return from the automobile Blystone killed Smithburger; only then did he flee the scene. Thus, this robbery was not complete when Blystone took Smithburger's money, nor when Blystone went to his car, but when he successfully fled the scene after murdering his victim.

Finding the evidence sufficient to support the convictions, we turn our attention to what the appellant characterizes as errors of the trial court. The appellant contends that these rulings by the court tainted his trial in such a way that he must be granted another. We address these rulings of the trial judge in chronological order.

A particularly incriminating piece of evidence in the Commonwealth's arsenal consisted of a tape recording of a conversation between the appellant and a police informant (See Appendix). On the tape Blystone is heard to recall the Smithburger robbery and homicide in lurid detail. Of course, the appellant attempted to keep this evidence from the jury by means of a pre-trial suppression motion.

After a suppression hearing the trial judge denied the appellant's motion and portions of the tape were played before the jury during trial. The court found the tape admissible because the surveillance was conducted in compliance with procedures permitted under the Wiretapping and Electronic Surveillance Control Act<sup>11</sup> in that the informant consented to wear a "wire".<sup>12</sup> The Act provides in pertinent part:

§ 5704. Exceptions to prohibition on interception and disclosure of communications.

It shall not be unlawful under this chapter for:

...

(2) Any investigative or law enforcement officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire or oral communication involving suspected criminal activities where:

...

(ii) one of the parties to the communication has given prior consent to such interception. However, no interception under this paragraph shall be made unless the Attorney General or a deputy attorney

<sup>11</sup> Act of October 4, 1978, P.L. 831, No. 164, § 2, 18 Pa.C.S. § 5701 *et seq.*

<sup>12</sup> In this instance the informant carried a tape recorder as well as a body transmitter which enabled the police to remotely monitor and record the conversation.

general designated in writing by the Attorney General, or the district attorney, or an assistant district attorney designated in writing by the district attorney of the county wherein the interception is to be made, has reviewed the facts and is satisfied that the consent is voluntary and has given prior approval for the interception; however such interception shall be subject to the recording and record keeping requirements of section 5714(a) (relating to recording of intercepted communications) and that the Attorney General, deputy attorney general, district attorney or assistant district attorney authorizing the interception shall be the custodian of recorded evidence obtained therefrom.

18 Pa.C.S. § 5704(2)(ii).

The appellant argues that warrantless consensual monitoring, as authorized by the Act, violated his rights as guaranteed by Article 1, § 8 of the Constitution of Pennsylvania, which provides:

The people shall be secured in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

This argument has been recently accepted by the Superior Court. *Commonwealth v. Schaeffer*, 370 Pa. Super. 179, 536 A.2d 354 (1987).<sup>13</sup> We, however, have not heretofore considered the matter.

<sup>13</sup> It should be noted that prior to the Superior Court's opinion in *Commonwealth v. Schaeffer*, 370 Pa. Super. 179, 536 A.2d 354 (1987), no court in this Commonwealth had accepted the position espoused by appellant. See *Commonwealth v. Harvey*, 348 Pa. Super. 544, 502 A.2d 679 (1985); *Commonwealth v. Hassine*, 340 Pa. Super. 318, 490 A.2d 438 (1985). See also *United States v. Geller*, 560

A look at the history of wiretapping in this Commonwealth reveals that the General Assembly has been cognizant of intrusions into the personal liberties of our citizens. For instance, our original statute dealing with the issue of wiretaps forbade any wiretapping unless all parties consented.<sup>14</sup> However, the current electronic surveillance statute strikes a balance between citizens' legitimate expectation of privacy and the needs of law enforcement officials to combat crime. In this regard the General Assembly has provided safeguards to protect the liberties of the citizens of the Commonwealth. For instance, the statute requires the Attorney General, deputy attorney general designated in writing by the Attorney General, district attorney, or an assistant district attorney designated in writing by the district attorney, to make a review of the facts of each case. Consent for the interception must be given by one of the parties. The Attorney General, deputy attorney general, district attorney, or assistant district attorney must be satisfied that the consent is voluntary. Only then will approval for the interception be given. In addition, the intercepted communications are subject to strict record keeping requirements.<sup>15</sup>

Appellant contends, however, that despite these safeguards the statute fails to pass constitutional muster. We disagree.

A statute commands the presumption of constitutionality when it is lawfully enacted, unless it clearly, palpably, and plainly violates the constitution. *Hayes v. Erie Ins. Exchange*, 493 Pa. 150, 425 A.2d 419 (1981); *Tosto v.*

F.Supp. 1309 (E.D.Pa. 1983), *aff'd sub nom. United States v. DeMaise*, 745 F.2d 49 (3d Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985). Therefore, the trial judge's rejection of appellant's position on this issue was consistent with precedent.

<sup>14</sup> Act of July 16, 1957, P.L. 956, No. 411 § 1, 18 P.S. § 3742. See *Commonwealth v. Papszycki*, 442 Pa. 234, 275 A.2d 28 (1971).

<sup>15</sup> See 18 Pa.C.S. § 5714(a).

*Pennsylvania Nursing Home Loan Agency*, 460 Pa. 1, 331 A.2d 198 (1975). Any doubts are to be resolved in favor of sustaining the legislation. *Hayes, supra*, at 155, 425 A.2d at 421.

In the area of electronic surveillance it has already been established that one-party consensual interceptions do not violate the Fourth Amendment. *United States v. Caceres*, 440 U.S. 741 (1979); *United States v. White*, 401 U.S. 745 (1971) *reh. denied*, 402 U.S. 990 (1971) (plurality opinion). However, since state courts are free to provide broader protections based on state constitutional grounds than those provided by the federal constitution. *Cooper v. California*, 386 U.S. 58 (1967) *reh. denied*, 386 U.S. 988 (1967); *Commonwealth v. Sell*, 504 Pa. 46, 470 A.2d 457 (1983), the federal precedents are not controlling, and consideration of our state constitution is required.

It has been held that the protection provided by Article I, § 8 of the Pennsylvania Constitution extend[s] to those zones where one has a reasonable expectation of privacy, *Commonwealth v. DeJohn*, 486 Pa. 32, 403 A.2d 1283 (1979) *cert. denied*, 444 U.S. 1032 (1980); and that Article I, § 8 creates an implicit right to privacy in this Commonwealth. *Commonwealth v. Platou*, 455 Pa. 258, 312 A.2d 29 (1973) *cert. denied*, 417 U.S. 976 (1974). To determine whether one's activities fall within the right of privacy, we must examine: first, whether appellant has exhibited an expectation of privacy; and second, whether that expectation is one that society is prepared to recognize as reasonable. *Commonwealth v. Sell, supra*; *Katz v. United States*, 389 U.S. 347, 360 (1967) (Concurring Opinion, Harlan, J.); *Commonwealth v. Tann*, 500 Pa. 593, 459 A.2d 322 (1983).

The United States Supreme Court has held that a person cannot have a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal that conversation to

the police. *Lopez v. United States*, 373 U.S. 427 (1963) *reh. denied*, 375 U.S. 870 (1963); *United States v. White*, *supra*; *Hoffa v. United States*, 385 U.S. 293 (1966) *reh. denied*, 386 U.S. 940 (1967). Furthermore, as noted above, the Court has held that one party interceptions do not violate the Fourth Amendment. *United States v. Caceres*, *supra*.

Basically, the Supreme Court has recognized the simple fact that a thing remains secret until it is told to other ears, after which one cannot command its keeping. What was private is now on other lips and can no longer belong to the teller. What one chooses to do with another's secrets may differ from the expectation of the teller, but it is no longer his secret. How, when, and to whom the confidant discloses the confidence is his choosing. He may whisper it, write it, or in modern times immediately broadcast it as he hears it.

As applied to this case the above cited cases are particularly significant for two reasons: one, the Pennsylvania wiretapping statute is based on its federal counterpart, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20,<sup>16</sup> the latter of which was cited with approval by the United State Supreme Court in *Caceres*, *id.* at 742;<sup>17</sup> and two, it is the federal body of law from which we derive our test for determining what actions fall under the rubric of a privacy right, *Katz*, *supra*, (Concurring Opinion, Harlan, J.).

Although, unless dictated by Supremacy Clause considerations, we are not bound to follow the federal interpretation of the federal act or the federal constitution in the interpretation of our state statute and/or constitu-

<sup>16</sup> Public Law 90-351, Title III, § 802, June 19, 1968, Stats. 213.

<sup>17</sup> See also, *Gelbard v. United States*, 408 U.S. 41 (1972); *United States v. Cianfrani*, 573 F.2d 835 (3d Cir. 1978).

tion, we are in this case, persuaded by the rationale behind those decisions. As Mr. Justice White stated in the lead opinion in *United States v. White*,

Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. *Hoffa v. United States*, 385 U.S. at 300-303. For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person, *Lopez v. United States*, *supra*; (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. *On Lee v. United States*, *supra* [343 U.S. 747 (1952)]. If the conduct and revelations made of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.

401 U.S. at 751.<sup>18</sup> (These statements were cited with approval in *Caceres*, *supra*, at 742-43).

<sup>18</sup> Mr. Justice White further stated:

Nor should we be too ready to erect constitutional barriers to relevant and probative evidence which is also accurate and reliable. An electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent. It may also be that

Therefore, since we find no constitutional defect in the statute, and since the Commonwealth in this case operated in compliance with the statute, the appellant's vivid recounting of the brutal murder of Dalton Smith-burger was properly admitted.

Appellant next argues that the trial court improperly sustained a Commonwealth challenge for cause of a prospective juror because that juror's opposition to the death penalty did not illustrate an inability to perform as a juror. The relevant *voir dire* testimony follows.

Q. [Prosecutor]: *If, after hearing all of the evidence in this case and the law as his Honor, Judge Adams, will give you, and as a member of this jury you believed that the death penalty is warranted, would you impose such a penalty?*

A. *Does that mean "capital punishment"? I don't believe in that.*

Q. *That is the death penalty. Do you have a moral or religious belief against capital punishment?*

A. *I am a Baptist and I don't believe in capital punishment.*

Q. *It is against your religious beliefs to support capital punishment?*

A. *Yes, it is.*

[Prosecutor]: Challenge for cause.

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with the recording in existence it is less likely that the informant will change his mind, less chance that threat of injury will suppress unfavorable evidence and less chance that cross-examination will confound the testimony. Considerations like these obviously do not favor the defendant, but we are not prepared to hold that a defendant who has no constitutional right to exclude the informer's unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question.

*United States v. White*, 401 U.S. 745, 753 (1971).

[Defense Counsel]: I would object to the challenge based on her answer.

Judge Adams: The Supreme Court has recently ruled that this is a legitimate reason to challenge for cause. We would overrule the objection. Mrs. [prospective juror], we would advise you that you are not going to be asked to serve on this jury because of your feeling. I would ask you please not to discuss with any other juror the questions that were asked you or your reasons for being excused. Thank you. You may step down.

(Emphasis added).

A determination of whether to disqualify a prospective juror is made by the trial judge based on both that juror's answers as well as demeanor, and will not be reversed absent a palpable abuse of discretion. *Commonwealth v. DeHart*, 512 Pa. 235, 248, 516 A.2d 656, 663 (1986), *cert. denied*, — U.S. —, 107 S.Ct. 3241 (1987).

The trial court clearly considered these criteria in granting the Commonwealth's challenge.

This court, as to Juror Number 102, had no difficulty in reaching the decision that her attitude and manner, as well as her words, indicated she had personal and religious beliefs which would prevent and substantially impair her performance and duty as a juror in accordance with the court's instructions and her oath. It is conceded that the court's dismissal for cause was abrupt, and that more extensive questioning would have placed an Appellate Court in a better position to resolve the issue so far as the printed record is concerned, but this court is clearly of the opinion, based on the printed record as shown, and the attitude and manner of the juror as this court found it to be, that she did not meet

the standards set forth and was properly excluded from the jury for cause.

Slip op. at 60-61. Though the trial court is apologetic for the state of the printed record, that concern is unnecessary. For the purpose of ruling on the Commonwealth's motion, the dispositive questions were posed and answered as indicated by our emphasis. This exchange shows this prospective juror could not carry out her duty to follow the law as the trial judge would instruct and, therefore, was properly excluded. *Commonwealth v. Sneed*, 514 Pa. 597, 526 A.2d 749 (1987); *Commonwealth v. Peterkin*, 511 Pa. 299, 513 A.2d 373 (1986), cert. denied, — U.S. —, 107 S.Ct. 962 (1987). See *Lockhart v. McCree*, 476 U.S. 162 (1986).

The appellant's final assertion of error on the part of the trial court concerns the testimony of the victim's father, Dalton Charles Smithburger, Sr. Appellant argues that the trial court erroneously permitted the Commonwealth to introduce testimony of the victim's character, intelligence and propensity to follow orders. The appellant contends that the impact of this testimony was to create sympathy for the victim which was irrelevant for purposes of determining the guilt or innocence of the defendant.

Initially, we note that the appellant has waived this issue by failing to object to this specific testimony. The sidebar conference during which the appellant's trial counsel voiced his objection follows.

[Defense Counsel]: We would stipulate to the testimony of Mr. Smithburger if it is merely to the fact that he identified the body as his son.

[Prosecutor]: I intend to offer him to testify as to (1) when he last saw his son and (2) what he was wearing and (3) where he made identification of the body and also (4) what type of student his son was. [parentheticals added]

[Defense Counsel]: I would stipulate to the testimony as to (3) his identifying his son, but I don't see any relevancy to (1) the last time he saw his son and (2) what he was wearing, and I would object. [parentheticals added]

Judge Adams: Does the Commonwealth wish to call him in light of the stipulation?

[Prosecutor]: Yes.

Judge Adams: We will permit you to call him. We would overrule the objection.

It is apparent from this record that the prosecutor offered this witness to address four factual matters. The appellant's trial counsel was willing to stipulate to one of these points and objected to two others. The fourth matter, which is the issue here, was not opposed then or later and, therefore, has been waived.

However, it is of little import that the appellant did not technically preserve his objection because the substantive argument supporting it is meritless. That argument points to the following testimony as prejudicial to the appellant.

Q. [Prosecutor]: Mr. Smithburger, what kind of student was your son?

A. Well, he went to Tech School and he passed his welding class.

Q. How would you describe your son—was he a troublemaker?

A. No, never a troublemaker.

Q. How was he as far as listening?

A. He listened pretty good.

Q. If someone were to tell him something, would he do it?

A. Yes, he would.

Q. I believe you told the police that he was in special education?

A. Yes.

[Prosecutor]: I have no further questions.

Evidence which has the effect of arousing sympathy for a crime victim is prejudicial and inadmissible when otherwise irrelevant. *Commonwealth v. Story*, 476 Pa. 391, 402, 383 A.2d 155, 160 (1978). In this case it is not apparent that the above testimony had the threshold impact of evoking sympathy for the victim in the minds or hearts of the jurors. The assessment of the trial court was that the "testimony was delivered in a matter-of-fact tone and was not done in a manner which would inflame the jury." Slip op. at 36. The mere characterization of the victim as an individual having a learning disability does not make his homicide more, or less, heinous.

Furthermore, this evidence was probative of the victim's passive nature and thereby lent credence to the Commonwealth's account of events prior to his death. Specifically, evidence of the victim's passiveness served to explain, at least in part, why Smithburger remained prone in the field while Blystone was at his automobile discussing with his companions the necessity of killing him. The appellant himself in his taped statement admitted that he was surprised by Smithburger's obedience.

I thought I was going to have to chase him through the field when I went back. I thought for sure this mother-f---r ain't goint to lay there, but I wanted to warn them—you know, Jackie and George—I wanted to warn them that I was going to waste him—I went back. I went back just expecting this mother-f---r to be through the fields. I had to laugh.

The testimony of Mr. Smithburger, being more probative than prejudicial, was properly allowed by the trial court. See *Commonwealth v. Ulatoski*, 472 Pa. 53, 63 n.11, 371

A.2d 186, 191 n.11 (1977). See also *Commonwealth v. Story*, *supra*, at 402, 383 A.2d at 160.

In addition to allegations of error on the part of the trial court, the appellant asserts that his trial counsel was ineffective because he failed to investigate and present an alibi defense. Blystone, represented by a different attorney, presented this complaint to the trial court long after the jury rendered its verdicts and set the appropriate penalty for the homicide conviction. After a post-trial hearing conducted to air this grievance the trial court determined that appellant's argument was meritless. We concur.

Initially, we note the appellant did not comply with the mandatory notice provision of the rule governing the presentation of an alibi defense, which provides:

#### C. Disclosure by the Defendant

##### (1) *Mandatory.*

(a) Notice of Alibi Defense. A defendant who intends to offer the defense of alibi at trial shall, at the time required for filing the omnibus pretrial motion under Rule 306, file of record notice signed by the defendant or the attorney for the defendant, with proof of service upon the attorney for the Commonwealth, specifying intention to claim such defense. Such notice shall contain specific information as to the place or places where the defendant claims to have been at the time of the alleged offense and the names and addresses of witnesses whom the defendant intends to call in support of such claim.

Pa. R. Crim. P. 305.C.(1)(a). The consequences to a defendant who ignores the notice provision are also made clear in the rule:

(d) Failure to File Notice. If the defendant fails to file and serve notice of alibi defense or insanity

or mental infirmity defense as required by this rule, or omits any witness from such notice, the court at trial may exclude the testimony of any omitted witness, or may exclude entirely any evidence offered by the defendant for the purpose of proving the defense, except testimony by the defendant, or may grant a continuance to enable the Commonwealth to investigate such evidence, or may make such other order as the interests of justice require.

Pa. R. Crim. P. 305.C. (1) (d).

This was not, however, an instance in which the alibi defense was barred simply because of a failure to comply with the Rules of Criminal Procedure. Blystone chose to present no defense whatsoever after the conclusion of the Commonwealth's evidence. At that point in the proceedings the trial judge conducted a colloquy out of the jury's presence to ensure that the appellant understood his right to advance evidence on his behalf. The appellant gave no indication to the trial court that an alibi defense was feasible. Consequently, there was not even an opportunity for the court to abuse its discretion in the application of the alibi defense rule, Pa. R. Crim. P. 305.C. (1).

Additionally, it is apparent from the record of the post-trial hearing that Blystone's alibi was a fabrication. At that proceeding the appellant waived the attorney-client privilege of confidentiality existing between him and his trial counsel. Trial counsel then testified that the testimony of the alibi witnesses would be contrary to the facts as recited to him by Blystone. In other words, the alibi witnesses would be perjuring themselves. It was also apparent that Blystone did not tell his trial counsel of the possibility of establishing his presence elsewhere at the time of the crime until after the Commonwealth rested its case.

During the post-trial hearing the trial court, through its own diligence, went so far as to locate one of the ap-

pellant's alibi witnesses and import her from West Virginia for the purpose of testifying at the proceeding. After hearing the witness' testimony, and juxtaposing it with that which she had rendered in a separate prosecution arising from the same incident, the trial court found the witness was not credible. Slip op. at 56.

This Court will not label counsel ineffective for failing to suborn perjury. Therefore, the appellant's argument is meritless.

In addition to the claims already aired, the appellant raises three arguments challenging the constitutionality of the death penalty. One of these arguments is couched in terms of error by the trial court. The appellant asks: "Whether the trial court erred in denying the defendant's motion for an evidentiary hearing to present testimony concerning the prosecution-proneness of the jury that convicted him?" To accept the appellant's contention of error, would be to accept the worth of his substantive argument to the effect that death qualified juries are prosecution-prone. We will not do this. *Commonwealth v. DeHart*, *supra*, at 250-53, 516 A.2d at 664-665. See *Lockhart v. McCree*, *supra*.

The appellant next asserts that the death penalty statute is unconstitutional under both the United States and Pennsylvania Constitutions because of its mandatory language. The part of the statute operative in this instance states: "the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance," 42 Pa.C.S. § 9711(c) (1) (iv). We will not dwell on this issue beyond noting that the appellant's argument was expressly refuted in the case of *Commonwealth v. Peterkin*, *supra*, at 326-28, 513 A.2d at 387-88.

The appellant also argues that this Commonwealth's death penalty sentencing statute violates his Eighth Amendment protection against cruel and unusual punish-

ment<sup>19</sup> because the operative aggravating circumstances in this case<sup>20</sup> is overbroad, arbitrary, and does not differentiate those murders which justify the penalty from those which do not.

The statutory procedure governing the imposition of the death penalty in this Commonwealth channels the discretion of the sentencing body to prevent the arbitrary and capricious imposition of capital punishment. *Commonwealth v. DeHart*, *supra*; *Commonwealth v. Zettlemoyer*, *supra*. Since we have previously held that the sentencing system on its face does not operate in an arbitrary or capricious manner, Blystone cannot prove a violation of his constitutional rights by mere assertions that other defendants who were similarly situated did not receive death sentences. See *McCleskey v. Kemp*, — U.S. —, —, 107 S.Ct. 1756, 1774 (1987), *reh. denied*, — U.S. —, 107 S.Ct. 3199 (1987). The focus of his challenge must, therefore, be upon the sentencing mechanism as it has been employed to render his death sentence.

A sentence of death is not merely the product of evidence which supports a particular aggravating circumstance. The Commonwealth must first prove beyond a reasonable doubt that an aggravating circumstance applies to the particular homicide. Thus, an aggravating circumstance has no relevance in the abstract; it can only be applied against an individual defendant by the

<sup>19</sup> The Eighth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962), *reh. denied*, 371 U.S. 965 (1962).

<sup>20</sup> The pertinent portion of the sentencing statute states:

(d) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

...  
(6) The defendant committed a killing while in the perpetration of a felony.

42 Pa.C.S. § 9711(d)(6).

particular sentencing body weighing the evidence before it. Should the fact-finder determine the Commonwealth has satisfied its burden of establishing the aggravating circumstance, then, and only then, does a penalty of death become cognizable. Therefore, the establishment of an aggravating circumstance represents the crossing of a threshold from a condition in which the sentencer cannot render a verdict of death to one in which it must. 42 Pa.C.S. § 9711(c)(1)(iv).

However, an individual may thwart the imposition of the death penalty by offering evidence of mitigating circumstances concerning his character, record, and the circumstances of the offense. 42 Pa.C.S. § 9711(e). In this manner the fact-finder may consider any relevant circumstance that could cause it to decline to impose the death penalty. A balancing of aggravating and mitigating factors which favors the defendant cannot be reversed, as that determination by the sentencing body is unreviewable. On the other hand, a sentence of death produces an automatic appeal to this Court in which we will curb abuses of the trial or sentencing proceeding.<sup>21</sup>

<sup>21</sup> The Sentencing Act provides:

(h) Review of death sentence.—

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence.

(3) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;  
(ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d); or  
(iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases,

There is no question that the death penalty may be constitutionally imposed for a murder committed in the course of a planned robbery. *McCleskey v. Kemp*, *supra*, at —, 107 S.Ct. at 1774; *Gregg v. Georgia*, 428 U.S. 153 (1976); *reh. denied*, 429 U.S. 875 (1976). In this case the jury expressly found this aggravating circumstance to exist and, thus, Blystone's case rose above the level below which the death penalty may not be imposed. Since he refused to present any evidence of mitigation, there was nothing to block that passage. Based on its finding that there existed one aggravating and no mitigating circumstance the jury returned a sentence of death. We find no fault with the sentencing body's performance of its duty.

Finally, it is the practice of this Court to examine, *sua sponte*, whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant. *Commonwealth v. Frey*, 504 Pa. 428, 475 A.2d 700 (1984), *cert. denied*, 469 U.S. 963 (1984). In examining this claim we emphasize that the statute requires a verdict of death in those instances in which the jury finds one or more aggravating circumstances and no mitigating circumstance, 42 Pa.C.S. § 9711(c)(1)(iv). Thus, by the very terms of the statute the death penalty cannot be considered excessive to the circumstances of this defendant.

Further, we note that the continuing study of capital cases maintained by the Administrative Office of Pennsylvania Courts (AOPC) reveals that Blystone's punishment is not out of proportion to that imposed on similarly situated defendants.<sup>22</sup>

considering both the circumstances of the crime and the character and record of the defendant.

42 Pa.C.S. § 9711(h).

<sup>22</sup> The AOPC study indicates that in those instances in which sentencing bodies have found one or more aggravating circum-

For the foregoing reasons, we sustain the convictions of murder of the first degree, robbery, and criminal conspiracy to commit those offenses. The sentences of death and ten to twenty years imprisonment are affirmed.<sup>23</sup>

Mr. Justice Zappala files a Dissenting Opinion in which Mr. Justice Larsen joins.

stances to exist in the absence of any mitigating circumstances, a sentence of death was returned in the overwhelming majority of those prosecutions.

<sup>23</sup> The Prothonotary of the Western District is directed to transmit to the Governor a full and complete record of the proceedings of this case both in the trial court and this Court. 42 Pa.C.S. § 9711(i).

## APPENDIX

THE FOLLOWING IS AS THE TAPE WAS HEARD BY THE COURT REPORTER:

BLYSTONE: Do you remember the body they found along the road next to the Redhead—along the Brownfield Road? Remember the body they found?

MILLER: Huh-uh.

BLYSTONE: Smithburger—found him laying in a field shot six times.

MILLER: I don't read the f—g paper.

BLYSTONE: Shot six times in the head.

MILLER: Six times?

BLYSTONE: Six times in the back of the head.

MILLER: Must have been a strong son-of-a-b—, huh?

BLYSTONE: They found five bullets in his head and a fragment of one and they said he had on a blue suit, a three piece suit, and lived up on the mountains, and they found him about a mile from the Redhead. Remember?

MILLER: Scott, I don't read the God damn paper.

BLYSTONE: Tell you what—go to the library.

MILLER: I am not going to no f—g library.

AT THIS POINT JUDGE ADAMS ASKS THE OFFICER TO STOP THE TAPE. HE THEN INQUIRED OF THE JURORS WHETHER OR NOT THEY COULD HEAR THE TAPE AND SOME OF THE JURORS RESPONDED THAT THEY COULD HEAR PORTIONS OF IT BUT SOME OF THE PORTIONS THEY COULD NOT UNDERSTAND.

JUDGE ADAMS: The tape gets stronger as it goes along. You may continue, officer.

OFFICER THEN CONTINUES TO PLAY THE TAPE, AND THE FOLLOWING IS THE TAPE AS HEARD BY THE COURT REPORTER:

BLYSTONE: Me and Jackie—you got to keep this quiet—we were out one night, and we didn't have any money, and I had a .22 and I kept telling them that we got to get money. We tried all kinds of s— and that wasn't working so I said "f— it—I'm going to just drive up and blow somebody's brains out and take their wallet." George was with us. Don't burn me.

MILLER: You think I'm going to f—g go to the state cops, man, and tell them "hey, look, and all this and that, I know this about Scott Blystone."

BLYSTONE: Don't even tell Jackie that I told you this or she'll f—g flip. Anyway, there's this guy hitchhiking (inaudible to reporter) and it was about 11:00, and we picked him up. Jackie is sitting in the middle, and so he got in, you know, and he said he was going up over the mountains, and I said "that's where we are headed." I said "we need gas money" and he said "well, I got a little bit." You know how everybody says they got a little bit.

MILLER: Yeh.

BLYSTONE: So I said "how much you got?" He said "not that much but I can give you something for gas" and then we pulled up to the foot of the mountain—that road that turns off from Hopwood.

MILLER: Taste this man. This is bad.

BLYSTONE: I pulled off and I said "I got to make sure, man, before I go up this mountain 'cause I ain't got gas to get back and then what the f— would I do."

MILLER: Wait a minute, you picked this guy up?

BLYSTONE: Yeh, in Hopwood on Route 40. I knew what I was going to do. I told everybody what I was going to do.

MILLER: Before you did it?

BLYSTONE: Yeh. They thought I was bull-s—g. Everbody thinks that Scott bull-s—s.

MILLER: Ain't that good apple pie?

BLYSTONE: It is pretty good.

MILLER: I told you you should have got one.

BLYSTONE: You don't believe this, do you?

MILLER: Go head.

BLYSTONE: He said something that ticked me off, you know, like "I can only give you a few dollars" or something like that, and so I pulled the gun out and stuck it around behind Jackie and I put the gun to his head and I said "get your f—g hands on the dashboard," and then I started reaching in his f—g coat. That's the part I got to leave out, that and one other part.

MILLER: Did he have a gun?

BLYSTONE: No, but I thought he did, and I almost splattered him right there in the car. That's when the car was wrecked—the back end was real f—d up, real identifiable. I told everybody what I had to do. So (inaudible to reporter) I said to him "get them on the dashboard, put them there" and then we went out the Brownfield Road and stopped for a second. I told George—I said "you get ahold of him until I get out of the car and come around to the other side." I didn't want this mother-f—r to get out and run, you know.

MILLER: George was holding him in the car, huh?

BLYSTONE: George was scared to death.

MILLER: He held him there, didn't he?

BLYSTONE: F—g right.

MILLER: He didn't?

BLYSTONE: I went around the other side of the car and put the gun to him and said "get out." I went back in the field with him. "George, come on" I said, "help me." George kept f—g around. Jackie told me that George was back there making excuses—"I got to light a cigarette" and "just a minute" and (inaudible to reporter) and "I'm getting out" and all this s—.

MILLER: He was scared.

BLYSTONE: In the meantime I had him back there searching him. If found his money (inaudible to reporter) which wasn't f—g much at all.

MILLER: How much was it?

BLYSTONE: I guess I can tell you because the cops wouldn't know—\$13.00.

MILLER: \$13.00?

BLYSTONE: Yeh, unlucky mother-f—r, it was a Friday and he had \$13.00. I said "where's the rest" and he said "that's all I got." I told him "lay down," and I said "you wait right here. I'll be right back." I said "don't move or I'll blow your f—g brains out." He said "I ain't going nowhere."

MILLER: You going to eat these fries?

BLYSTONE: No, go ahead. So then I ran back to the car. I said "he has got" (inaudible)—I didn't know how much it was. I said "he has got about \$15.00 on him."

MILLER: Ain't no wonder you don't want them, man; they are f—g cold.

BLYSTONE: I said "he can identify us—he was looking." He kept looking. I kept telling him "close your f—g eyes, you mother-f—r."

MILLER: When he was down on the ground?

BLYSTONE: No, when he was in the car. He kept looking at us, you know, and he was looking in the back

seat and I said "shut your f---g eyes, man." He'd go (some sort of sound), and I said "turn your f---g head." He would turn his head like that, and I said "man, you're dead." So then I ran back to the car and told them "I got to kill him,"—said "can everybody handle it."

MILLER: You left him there and you ran back to the car?

BLYSTONE: He never moved. He thought I was there. (inaudible) I stepped around him, right, and I walked a little bit in a circle and I stopped. I didn't make no noise, and I said "don't think I am gone, mother f---r," and then I f---g tiptoed off, you know. I told them I said "I'm going to kill him." Everybody said "yeh, go ahead, kill him,"—you know, so I f---g ran back there and got over top of him and I said "what kind of car were you in tonight?" He said "I wasn't driving, man." He said "I told you I don't have a car," and I said "what kind of car picked you up?" He said "all I know is it was green and the back end was wrecked." I said "goodbye" and he tightened up, and I f---g wasted him. Blood splattered all over me, and then I came running back to the car—jumped in the car. Jackie had it in drive. I shot him six times. You should have heard it, man—pow, pow, pow, pow, pow, pow. Brains started oozing out of this f---. Every hole I would put in his head, brains would start oozing out each time I shot him, right?

MILLER: Uh-huh.

BLYSTONE: I found brains on my nose. Jackie picked them off my face that night. I jumped in the car, and the car was f---g rolling. We went back to George's house and got the blood off me.

MILLER: I bet they was scared. They probably thought you was bull-s---g.

BLYSTONE: I know. It's like they didn't believe me. I had blood all over me.

MILLER: Was George there?

BLYSTONE: Yeh.

MILLER: He was right there?

BLYSTONE: No, he didn't get out of the car. He never got out of the car. Then I ran back, and I didn't say nothing to him until later on and I said "man, you were supposed to be with me." Then Jackie told me what he was doing—he was stalling. I left some evidence back there. When I was searching him I pulled out a pack of cigarettes and I picked up the pack with my bare hand. We sat around (inaudible).

MILLER: Pack of cigarettes?

BLYSTONE: I know for two hours we sat at the house. I sat there and I said "man, they can't get the footprints—there is a million out there." "There ain't no scrapings under his nails or nothing, or under mine," and I said "we got all the blood off." I kept telling them "get that pack of cigarettes." I said "that's the only thing that can get me." I said "f--- it—we are going back down," and then we ran out of gas—we ran out of gas out there.

MILLER: Where at?

BLYSTONE: Right after we went back.

MILLER: You ran out of gas right there?

BLYSTONE: About 200 yards from it.

MILLER: Back towards the gas station?

BLYSTONE: Uh-huh.

MILLER: You didn't have far to walk then?

BLYSTONE: Huh-uh. Anyway, we got back there, and I told George—I said "look, the place might be staked

out." I said "we are going to get out of the car like we are taking a p—," and I said "I'll take you over to the body and stand there and just keep talking—bull-s—g" and then I said "you look over and notice and say 'hey, what's that' "?

MILLER: You like that apple pie?

BLYSTONE: Uh-huh. So we get over there, right—get out of the car.

MILLER: I'd like another bite of that mother-f—r too.

BLYSTONE: (inaudible to reporter).

MILLER: You should have bought one of these. You should have let me buy you one.

BLYSTONE: We get out of the car, pull our d—s out and start p—g, and George says "what's that?"

MILLER: You didn't p— on him, did you?

BLYSTONE: Huh-uh. George said "what's that—look" and we were talking nice and loud in case there was any cops in the bushes. He said "right there" and I said "I don't know" and I said "my God, it looks like a body" and George said "no, man" and I said "look, man, it is a f—g body."

MILLER: In case there was somebody around?

BLYSTONE: (inaudible to reporter) went back there and said "if you ask me, George, I blew his head off, man."

MILLER: (inaudible).

BLYSTONE: So he said "my God, we had better call the police." I said "yeh, let's look for some I.D. and see if we can find out who he is." I started looking. I had this f—g light—looking around.

MILLER: Just in case there was some body around?

BLYSTONE: Right. I said "try to find some I.D. on him." I knew we were looking for the cigarette pack—couldn't find it nowhere. Then I remembered when he laid down—when I took the stuff off of him, I threw it down in front of him. I threw it down in front of him when he laid down—he laid straight down.

MILLER: On his face?

BLYSTONE: I said "George, it must be under his f—g body" and we walked over. George put the light on this guy. I grabbed him by his f—g coat, pulled him up—moved him up, and man, he was nothing put a pool of blood. One eye was out and his f—g eyebrows—his whole brow, man, was like real swollen—looked like somebody had beat him with a baseball bat,—cheeks were all swollen. There was holes in them and coming out of his throat, and s—, his teeth were in the ground. They were blown in the ground.

MILLER: Big time, huh?

BLYSTONE: This f—r was done—he was a f—g mess. I tell you he was drenched in f—g blood. I picked the pack up and I stuck it in. I said "man, let's call the police." We jumped back in the car, went back to the house, and waited all night.

MILLER: You took that pack of cigarettes off of him?

BLYSTONE: We smoked them. They had blood on the filters and we smoked the f—g cigarettes, and we waited right. We kept waiting and waiting to hear something on the TV or the radio.

MILLER: Were they "Kools," man?

BLYSTONE: No, I can't tell you what they were 'cause that's another thing too—they were unusual.

MILLER: I don't give a f—.

BLYSTONE: Then we went back two or three hours later, right.

MILLER: You went back three times?

BLYSTONE: Twice.

MILLER: Oh.

BLYSTONE: I killed him and then we went back for the cigarettes, and (inaudible)—So we went back to the house, right, and we are sitting around listening and waiting—just f—g waiting. I think about—

MILLER: You went back to George's house?

BLYSTONE: Uh-huh.

MILLER: After you done run out of gas?

BLYSTONE: Well, when we left there the second time when we got the f—g cigarettes, we are going up the f—g road and the car goes (sound)—oh, f—, man, I put it in neutral and drifted it as far as I could and then pushed it over to the gas station, and then this dude got us some gas downtown.

MILLER: You must have been right up on top of the hill then?

BLYSTONE: Yeh—so anyway, about 11:00 the next day—

MILLER: Because I know you and George can't push that car up that f—g hill.

BLYSTONE: Not uphill, no. It drifted a good ways. I was rolling. When I came out I was rolling. We were acting like we found a dead body. So the next day we all went to sleep for three or four hours, and got up and turned it on, and we were waiting and waiting—nothing, man—no TV, no radio, nothing. They had to find him. I said "they should have found him at the crack of dawn." Finally on WPQR "we interrupt this"—you know how they bull-s—"body of an unidentified man found" I don't even think they said "shot to death"—

they said where he was—that he was dead, and about an hour or so later then said that he was shot. Then it came out in the papers that he was shot six times in the head, and they kept talking about it on the radio.

MILLER: This next day?

BLYSTONE: Yeh. It was on TV and it was on the news—6:00 news. It was in the paper for about three days that the State Police needed help in the slaying—that a man was shot with a .22 caliber pistol six times in the back of the head along Brownfield Road, and that he was 6-3 and weighed, I think, 195.

MILLER: Is that the gun we shot off my porch?

BLYSTONE: I wasted him, Miles. That mother-f—r, when I got over him, I was down—

MILLER: You still got that f—g thing now?

BLYSTONE: That's why I told you I couldn't sell it—the murder weapon.

MILLER: I hope you got that mother-f—r put away.

BLYSTONE: I buried it. I bent down over top of him—

MILLER: Up there at your dad's house?

BLYSTONE: In the woods. I put it down to his head, and when I shot, man, the barrel was only this far from his face. Every time I fired, f—g s— would splatter in my f—g face. I got up and ran back to the car, but they didn't believe it. Everybody was real (inaudible)—real calm 'cause all they could hear was shots. We went back—Jackie saw it—couldn't have been right from here to the car, and when George lit that lighter and I picked him up, you could see his face and he looked like a f—g ghoul—like a mummy or something. His face was all f—g swollen and black and blue. His eyes were clouded over. His f—g teeth—blew all his f—g teeth

out, and about half of his jaw came off, but nothing ever happened. Nobody ever came to us. Nobody ever ask no questions—nothing—it's an unsolved murder.

MILLER: Man, oh, man.

AT THIS POINT THE TAPE WAS STOPPED.

JUDGE ADAMS: Officer, you may go into my chambers to adjust the tape.

THE OFFICER AND ATTORNEY SOLOMON GO INTO THE JUDGE'S CHAMBERS TO ADJUST THE TAPE.

AFTER DOING SO, THE OFFICER AND ATTORNEY SOLOMON RETURN TO THE COURTROOM AND THE TAPE RECORDING, AS HEARD BY THE COURT REPORTER, IS AS FOLLOWS:

BLYSTONE: What I am trying to tell you, man, is—it's easy. It's f—g easy, you know.

MILLER: To kill somebody?

BLYSTONE: To get away with it.

MILLER: Yeh, I guess so—like that—God damn.

BLYSTONE: It was wild. You should have seen it. You should have seen George give me that f—g look. He was standing there p—g. He was standing like this and he was f—g looking, you know. (inaudible) When I turned him over I thought he was going to (inaudible) boom, boom, boom—I was ready to go again.

MILLER: You had it loaded up again, huh?

BLYSTONE: I would have man. It was—I was ready to go—I swear. Miles, this man is six feet. Jackie said—when he put his hand like this (inaudible), I said "put your hands on your head." He put them like this and his f—g hands curled clean down over his knees.

MILLER: He was a big dude?

BLYSTONE: I said "don't you move." I told him—I said "I'll splatter you all over this f—g car." He said "I ain't doing nothing." I said "don't you touch the doorknob—don't touch my girl." I said "don't take your hands off your legs or I'll waste you"—and when I told him "goodbye"—

MILLER: He didn't try f—g nothing—he never tried to get away or nothing?

BLYSTONE: No. I thought I was going to have to chase him through the field when I went back. I thought for sure this mother-f—r ain't going to lay there, but I wanted to warn them—you know, Jackie and George—I wanted to warn them that I was going to waste him—I went back. I went back just expecting this mother-f—r to be (inaudible) through the fields. I had to laugh.

MILLER: So when you came back to the car you just f—g said "I'm going to waste the mother-f—r", and when you went back to him you said "I'm going to waste you" and he didn't—

BLYSTONE: No, I didn't tell him then.

MILLER: —f—g get up or nothing?

BLYSTONE: I didn't tell him then. I didn't tell him I was going to waste him then. I asked him what kind of car he was in and he said "all I know it is was green and it was wrecked in the back." I said "well, goodbye." He tightened up—tensed up. I think he s— himself. His whole body went rigid because I was sitting on him.

MILLER: You was sitting on him?

BLYSTONE: Sitting on his back, you know—had my knees across him, and I told him "well, goodbye," (inaudible)—the barrel. So I put it to his head and then pulled it off an inch and then I said "goodbye." He went like that, and that's the last move he made and I hit him.

MILLER: He didn't move after that?

BLYSTONE: He never moved.

MILLER: I guess not, man—f—g six pieces of lead flying in your f—g head.

BLYSTONE: Pow, pow, pow, pow, pow, pow. I jumped up, came running back. We went back to the house and Jackie said "what's that on your face" and I said "that a f—g piece of his brain." She said, "oh, my God, brains." (inaudible)—and was playing with it and threw it in the ashtray—had to wipe my face of—had to take a shower and soak my clothes in cold water. You know that number 12 football jersey I had, the white jersey with the blue shoulders?

MILLER: Yeh.

BLYSTONE: That's the one I killed him in. I think I had these pants on too—I am not sure. These are jeans. I forget what it was.

MILLER: God damn. You f—g (inaudible)—you just f—g done it. You don't want none of this milkshake, do you?

BLYSTONE: (inaudible) There ain't nothing to getting away with something, you know. It's very easy. If you'd go—

MILLER: Wait until I throw this s— in the back of the truck, man. I am going to throw it down here. That's f—g ignorant. I'll give this sandwich to Rover. Remember Rover? I hope it f—g blows out all them papers and s— you know.

BLYSTONE: If you know what you are doing, man, you can get away with anything, including murder. It ain't hard at all.

MILLER: God damn.

BLYSTONE: I knew the only way I could get caught is if somebody talked, but nobody's going to talk 'cause I'm going to kill them too.

MILLER: Yeh, no s—.

BLYSTONE: George—ever since then George has been like—

MILLER: Ain't you afraid that f—g George might tell somebody?

BLYSTONE: No, see I told George that I'd waste him too. I said "I'll torture you." I told him I'd blow his f—g c— off and everything else if he opens up his mouth. Like (inaudible). He is an accessory to murder. He went back there and touched the body with me, and Jackie's an accessory.

MILLER: How did he touch it if he was holding the f—g lighter?

BLYSTONE: He touched him. He was feeling around on the ground and around the body. I didn't want to touch it because of the evidence but I thought that is where the mother-f—r is. I said "it's under his body." When I took the s— off of him I threw it on the ground, and then I told him to lay down on the ground, and he got down on his knees and got down. Sure enough it was right there. I rolled him over and it was under his f—g chest, and I said "we got it—let's get the f— out of here. Let's go call the police and then tell them about this body."

MILLER: You didn't call them though?

(BACKGROUND NOISE—INAUDIBLE TO REPORTER)

BLYSTONE: You ain't going to say nothing about this?

MILLER: What the f— do you think—even if I did.

(INAUDIBLE TO REPORTER)

MILLER: You know, if I don't find a job pretty soon, man, I'm going to f---g go steal something.

BLYSTONE: Murder is a real f---g experience. It's wild. She thinks it's wild.

MILLER: Did she freak out?

BLYSTONE: No, she's all right. She was worried for a few days. I was worried about her losing it, but she wasn't right there when I wasted him.

MILLER: She's still f---g involved.

AT THIS POINT THE TAPE WAS STOPPED BY THE OFFICER AND ADJUSTED.

JUDGE ADAMS: You may start the tape.

OFFICER STARTS TAPE AND THE TAPE RECORDING, AS HEARD BY THE COURT REPORTER, IS AS FOLLOWS:

BLYSTONE: George never believed me. When I used to say "I'll kill him" he'd look at me like "yeh, sure, okay," but now when I tell George "hey, I'll kill you, he looks at me like "this mother-f---r is going to kill somebody.

MILLER: He thinks you are for real, ain't it?

BLYSTONE: He think I'm for real.

MILLER: That you have the nerve?

BLYSTONE: When I tell him that I'll kill him, it don't mean I'm going to "beat you up or hurt you; it means I'm going to kill you," and Jackie looks at me different, you know.

MILLER: The only thing I'm really f---d up about, Scott, is—

BLYSTONE: It don't make you feel bad, Miles. It don't make you feel like an ogre.

MILLER: You don't dream about it or nothing, huh?

BLYSTONE: No. We laugh about it. Miles, it gives you a realization that you can do it, man.

MILLER: And get away with it.

BLYSTONE: You can walk up and—

MILLER: I hope this ain't your mom.

BLYSTONE: You can walk and blow somebody's brains out and you know that you can get away with it. It gives you a feeling of power, self-confidence, you know. Like, I mean I had confidence in myself before because I did it, but Jackie and George—they had doubt in their minds and I said "the mother-f---r does this, I'm going to kill him," but now when I say it to them—

MILLER: You just did it to prove it to them?

BLYSTONE: No, it was necessary. The guy could identify us, you know. It proved a point at the same time. He saw my face, Jackie's face, George's face, and he saw the car, you know, and we talked to him for five minutes before I even pulled the gun, and he was looking at us and all this s—.

MILLER: That freaks me out, man, that he didn't even try to get away.

BLYSTONE: He was so scared. When I was searching him, his body was shaking.

MILLER: He acted like he was stupid, man.

BLYSTONE: He might have tried to get away, you know, but like I said, I walked away from him out to where I could walk without making no noise, and I stood there for a minute—stood there, and I didn't make a sound and he didn't move, man. Then I made a noise and

said "don't think I'm gone." I said "I'm right here. You move and I'll kill you." Then I went back to the car and I said "look, I got to go back there and kill him," and I said "does anybody have any f---g beefs,"—no, kill him.

MILLER: Everybody said "kill him," huh?

BLYSTONE: Yeh. I ran back to the f---g guy and bent over him.

MILLER: And George even said "kill him?"

BLYSTONE: Yeh, George said "kill him."

MILLER: God damn.

BLYSTONE: And I f---g killed him—got back in the car

MILLER: You think he wouldn't say nothing because he didn't even want to go out with you.

BLYSTONE: He wanted to come. He run his mouth, like I am saying.

MILLER: He didn't want to go the second time?

BLYSTONE: To go back to see the body, yeh, he wanted to, but once he saw the body he realized. I don't know where he thought the blood might have come from—his brains, or you know, but it didn't him him, and when he was standing there p---g, Miles, his eyes were like—

MILLER: Glued on the guy?

BLYSTONE: He'd look at the guy and then look at me—(inaudible) and then when we lifted him up and George seen (inaudible).

MILLER: He must have had a lot of blood on him, all over his clothes and s---?

BLYSTONE: Right—blew his eye out—it was all over him.

MILLER: You should have took his jacket, man, to keep your ass warm (inaudible). I would have if I'd killed so somebody, man (inaudible).

BLYSTONE: (Inaudible), and like I said, the weirdest thing was his f---eyebrows. It looked like somebody took this f---r and beat him with a baseball bat in the face. The concussion, man, from them bullets hitting him from the back and then coming up and slamming against his skull and cheekbones and s--- and roof of the mouth, it looked like something off of a horror movie, —a monster. His eyebrows were out to here, his f---g cheekbones were out to here, his nose was real swollen and part of it was blown off—his teeth were gone. It blew his teeth—you could see his teeth sticking in the ground.

MILLER: Wasn't the wind blowing or anything that night to blow the f---g light out in your lighter?

BLYSTONE: It didn't blow it out. We both had a lighter. We were looking around like we were looking for I.D., but we wasn't.

MILLER: God damn (inaudible).

BLYSTONE: I saw the jacket—Dalton Smithburger—but don't tell nobody because they be related, you know. A guy might blow your f---g head off for just talking about.

MILLER: Yeh, I imagine—no s---.

BLYSTONE: He lives up in Farmington, I think. He lives up on the mountain somewhere—Farmington, Chalk Hill, or Markleysburg.

MILLER: Did he freak out when he seen you wasn't taking him up over the mountain?

BLYSTONE: Yeh, when I saw him there on that road there I was checking him out, you know, and I pulled over and he said "heading for the mountain" and I said "hey, we are going up there too" and he said "that's

good" and I said "but look I need some cash" and he said "well, I don't have much money." I pulled off down that road and then I said "look, if I go up this mountain I got to have some money because I won't be able to get back." I said "I don't mind taking you up but . . ."

MILLER: When did you put the f—g gun on him, man?

BLYSTONE: I'll tell you. I told him I was going to take him up because we were going ourselves, but I said "we got to have a way back," and he said "well, I got a few dollars on me," and I said "I don't know." He said "I can give you a few for gas" and then he started getting in his jacket and then I reached around Jackie and I said "put your f—g hands on the dashboard," and he said "oh, oh" and I said "put your f—g hands on the dashboard." I kept telling him, I warned him—I said "the more you open your eyes, the more trouble you are going to be in." He kept f—g trying, man. He kept sneaking looks. He'd see a lightpole coming by, you know, through his eyelids, and he would look up and look around to see where he was, and I said "mother-f—r, shut your f—g eyes, man." I knew when I pulled the gun I was going to kill him (inaudible). He saw the back of the car, you know.

MILLER: When did he do that?

BLYSTONE: When we picked him up. He came from the back and he could see it was a green Dart with a a f—g demolished rear end, and that ain't hard to f—g identify, and I told everybody—I said "look, if I would have killed that mother-f—r, we would be in jail right now." (Inaudible) All the guy had to do—he didn't have to say it was a Dart or Dodge. All he had to do was to say a green car with a mashed rear-end and they would pick me up as the driver.

MILLER: Yeh, 'cause there ain't none around.

BLYSTONE: Yeh, take me in front of him and he will say "that's the f—g guy right there—the guy who robbed me," so I told them the only thing to do was to f—g kill him. I said "do you want to end up in jail?" Believe me, if he was alive we'd all be in jail for armed robbery (inaudible). That's why I don't want to f— around any more. If I think that mother-f—r is going to identify me, or his being alive is going to hope me get caught or if I ain't going to have time to get away or something, I'm going to kill him. Then I know I can take my time. The next job I am thinking about doing—if I murder this guy, my intention is to dig a grave, but it was getting dark, and you called and Jackie called. I was going to dig one because I am ready to do the job which would help get my house, my apartment, have enough money for Christmas and (inaudible).

MILLER: I wish the f— you'd have sold me that gun, man. You f—g blew my job of making ten or twenty bucks.

BLYSTONE: Miles, I can't. It is a f—g murder weapon, you know.

MILLER: It ain't going no good out there, man.

BLYSTONE: No, but (inaudible) rather it not be used.

MILLER: Them guns, man—(inaudible) there is a left twist and there is a right twist, okay?

BLYSTONE: Most is right-twist.

MILLER: How many of them is there around that's got a right twist or a left twist? I mean, God damn, man, how in the hell can they match that up?

BLYSTONE: They have records of those bullets, okay. They did an autopsy on the guy. They have prints of those bullets, okay, in the unsolved crime files. Every time that a .22 is confiscated, they are going to try to

match it to who fired it, and they match it. When they match it, whoever has that gun is going to be charged with murder.

MILLER: How in the hell do you know if you got a right or a left twist?

BLYSTONE: Most guns have a right-hand twist. Very few guns have a left-hand twist. (Inaudible) have them. Most of them is right, but the bullet is—it really don't matter—right or left-hand twist. More what they look for is rifling grooves; you got (inaudible) grooves plus a firing pin. Every firing pin hits a case at a certain spot, like off-center, to the left, to the right, low or high or (inaudible) takes a certain shape of impression. With an automatic, with a .45—a lot of people don't know this—when you chamber a .45 you throw your clip in there—chamber one, and that fires—well, if you fire or whatever, when you eject that f—g thing, you leave what is called "chamber marks" on your casing. They can identify—they can match the gun up with the chamber it came out of with the bullets just by the little scratches and s— because every chamber puts a different mark on it—every firing pin puts a different mark (inaudible). A lot of people think "well, I'll change the barrel and they will never know," but they will match the firing pin and the chamber, especially in an automatic. Same thing with bolt rifles. If you had a microscope, you could look, chamber six or seven rounds, jack them out and line them up on a microscope and see if they all match up, scrape marks, everything.

MILLER: So even if they did find that gun—let's say they did find that God damn gun—I am getting ready to take off, man.

BLYSTONE: I want to take a p—.

MILLER: Even if they did find the gun—that's not saying that they can f—g match it up according to what they say.

BLYSTONE: They can.

MILLER: They can—how?

BLYSTONE: What they do, they have it on file, man; it is like an x-ray.

MILLER: Inaudible.

BLYSTONE: What they do is when they got a murder, they will take pictures of the bullets.

MILLER: Inaudible.

BLYSTONE: (Inaudible)—and every time they find a .22, and they confiscated it for murder, it will go to the unsolved cases (inaudible) with .22's. They are going to go through the .22 unsolved murders and they are going to fire a bullet into those ballistic (inaudible) and all they got to do—they probably got 20, 30 unsolved .22 murder cases, right—they just take it and check it, and when they get one, you are—(inaudible).

MILLER: I'm going to take off, man (inaudible)—I don't know whether it does any good whether I go home or not, man. I go home and she's (inaudible) and I go to Frank's, you know what I mean, because she is always there. Either she is there, or I go there and Frank and them tell me that she just left, and I know they are lying, you know what I mean—I know they are lying because I'll sit up the road sometimes and smoke a cigarette because I figure that I'm going to go home and she is not going to be there, and then tell me bull-s— like that, and guaranteed, man, I've stood up the road and smoked a cigarette. Didn't you see her? Bull-s—; that's bull-s— man.

AT THIS POINT THE OFFICER TURNS OFF THE TAPE.

## DISSENTING OPINION

JUSTICE ZAPPALA FILED: OCTOBER 17, 1988

Because I disagree with the majority opinion's conclusion regarding the constitutionality of the Wiretapping and Electronic Surveillance Control Act, 18 Pa.C.S. § 5701 et. seq., I must dissent.

Since the majority sets forth the actual provisions of the Act, it is only necessary to summarize the Act. Under the Act, with the consent of a participating individual, the government may electronically eavesdrop upon a person using a body tap upon the approval of the Attorney General, the District Attorney or their enumerated authorized agents. Noticeably missing from the Act is a requirement that a disinterested judicial officer review the facts to ascertain whether probable cause exists for the intercept. It is the failure to provide for the later requirement which causes me to conclude that this part of the Act is unconstitutional. The consensual interception authorized by § 5704 amounts to a search and seizure requiring either a warrant or probable cause as required by Article I, section 8 of our Constitution.

There is no question that the interception of an oral communication is considered a "search and seizure" as those terms are constitutionally defined under both the federal and state constitutions. See, *Katz v. U.S.*, 389 U.S. 349, 19 L.Ed.2d 576, 88 S. Ct. 507 (1967); *Commonwealth v. White*, 459 Pa. 84, 327 A.2d 40 (1974). As the majority correctly points out, in interpreting the Fourth Amendment's protection against unreasonable searches and seizures, the United States Supreme Court has taken the approach that one party consensual interceptions do not violate that provision since an accused waives his "expectation of privacy" by conversing with another party. In short, the United States Supreme Court

and the majority can discern no difference between communicating with the police informant who in turn reports to the police and surreptitiously recording the conversations directly by interception. This analysis embodies the proposition that the key factor to be considered in a wire intercept is whether the individual has a "legitimate expectation of privacy" and whether he has waived that expectation by disclosing information to any other party. While on the surface the majority's reliance upon the federal court's position seems to have merit, closer analysis reveals that blind adherence to this proposition is erroneous.

In its rush to adopt federal jurisprudence to support its position, the majority merely pays lip service to the admonitions of Mr. Justice Brennan of the United States Supreme Court which we heeded and embraced in *Commonwealth v. Sell*, 504 Pa. 46, 49, 470 A.2d 457, 459 (1983):

[T]he decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them. Rather, state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.

In refusing to adopt the United States Supreme Court abolition of "automatic standing" under the Fourth Amendment of the Federal Constitution in *Sell*, we reaffirmed our prior holding that the:

state may provide through its constitution a basis for the rights and liberties of its citizens independent from that provided by the Federal Constitution, and that the right so guaranteed may be more expansive than their federal counterparts. (Citations omitted)

*Commonwealth v. Tate*, 495 Pa. 158, 169, 432 A.2d 1382, 1387 (1981). In *Sell*, we then analyzed the federal case law limiting standing under the Fourth Amendment against the evolution of protected liberties guaranteed by Article I, section 8 of our own constitution and had no problem in rejecting the federal analysis of "automatic standing" under our comparable constitutional clause.

It is also important to note that in *Commonwealth v. Sell*, *supra*, we upheld the overriding importance of "privacy" under our constitution:

In construing Article I, section 8, we find it highly significant that the language employed in that provision does not vary in any significant respect from the words of its counterpart in our first constitution. The text of Article I, section 8 thus provides no basis for the conclusion that the philosophy and purpose it embodies today differs from those which first prompted the Commonwealth to guarantee protection from unreasonable governmental intrusion. Rather, the survival of the language now employed in Article I, section 8 through over 200 years of profound change in other areas demonstrates that the paramount concern for privacy first adopted as a part of our organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth.

504 Pa. 65, 470 A.2d 467. Thus, unlike our federal counterparts, the right to privacy has been elevated to a paramount right guaranteed to every citizen of this Commonwealth. This paramount status was even acknowledged by the legislature in defining an "oral communication" under the Act.

"Oral communication." Any oral communications uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation.

18 Pa.C.S. § 5701. If a person has a legitimate expectation of privacy, that paramount right should not be infringed upon without a corresponding justification.

Both the majority and the United States Supreme Court adhere to the view that a "person cannot have a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversations to the police." (Citations omitted) (Slip Opinion, p. 12). The majority adopts the federal rational without offering any persuasive argument for doing so. Under the majority view, a person could *never* be sure of having a confidential conversation with another. Communicating in and of itself would waive any right of privacy. As is evident, such an approach has a chilling effect, relegating the right of privacy to nothing more than a useless ideal which could only be exercised when one is alone.

I find comfort and support for my position in this appeal from a recently decided decision of the Supreme Court of Oregon. See *State of Oregon v. Roger Jonathan Scott Campbell*, 306 Ore. 157; 1988 Ore. LEXIS 400 (filed July 12, 1988); Accord, *Commonwealth v. Blood*, 400 Mass. 61; 507 NE2d 1029 (1987) (Similar Massachusetts interception statute held unconstitutional as being unreasonably intrusive to impose risk of electronic surveillance on every act of speaking aloud to another person). In *Campbell*, the court was faced with the question of whether or not under its state constitution, police use of a radio transmitter to locate a private automobile to which the transmitter had been surreptitiously attached is a "search or seizure". In rejecting the state's argument that the court should embrace the decisions of the United States Supreme Court which validated such a

use, the court boldly disassociated itself from the United States Supreme Court's decisions allowing such a monitoring, *United States v. Knott*, 460 U.S. 276, 103 S. Ct. 1081, 75 L.Ed.2d 55 (1983), and *United States v. Karo*, 468 U.S. 705, 104 S. Ct. 3296, 82 L.Ed.2d 530 (1984) because the United States Supreme Court's interpretation in those cases did not comport with the interpretations of the Oregon Supreme Court regarding search and seizure and privacy protection as set forth in Article I, § 9 of the Oregon Constitution. After finding that privacy is an interest protected by Article I, § 9 of its state constitution the court discussed blind adherence to federal jurisprudence.

Even were the provisions identical, this court would nonetheless be responsible for interpreting the state provision independently, though not necessarily differently. Majority opinions of the Supreme Court of the United States may be persuasive, but so may concurring and dissenting opinions of that court, opinions of other courts construing similar constitutional provisions, or opinions of legal commentators. What is persuasive is the reasoning, not the fact that the opinion reaches a particular result. (Emphasis supplied)

*Oregon v. Campbell*, 1988 Ore. LEXIS 400 at p. 6.

After a thorough review resulting in the rejection of the United States Supreme Court's reliance on reasonable expectation of privacy analysis, the Oregon Court considered the argument that information legitimately available through one means may be obtained through any other means without engaging in a search. In the court's poignant rejection of that premise it determined that:

[t]he constitutional provisions against unreasonable searches and seizures do not protect a right to keep any information, no matter how hidden or "private", secret from the government. (Citations omitted)

What the provisions forbid are unreasonable searches and seizures, i.e., certain acts of the government. Article I, section 9 "presents the police with a web of rules that are meant to protect the privacy interests of 'the people', and the police violate section 9 if and only if they violate these rules. *State v. Tanner*, 304 Ore. at 320. Whether police conduct is a search does not turn on whether its object could be discovered by conduct that is not a search. For example, in *State v. Lewis*, *supra*, the defendant exposed himself to public view through his living room. This Court held that the police officers did not engage in a search by photographing him from a house across the street with a 135 m.m. camera lense, which provided only minimal enhancement of what could be observed with the unaided eye. Nonetheless, the police officers would have engaged in a search had they entered his living room to observe what could be observed from the street. Similarly, if an undercover police officer is invited into a home and observes illegal conduct, the officer has not committed a search, but an unconsented entry into the home by other police officers to observe what the undercover officer could or did not observe would be a search. The issue is not whether what the police learned by using the transmitter in this case was "exposed to public view", but whether using the transmitter is an action that can be characterized as a search.

...

The problem presented by this case is essentially much like that presented in *Katz*, which was whether using a hidden listening device placed in a public place could be considered a search. Conversations in public may be overhead, but it is relatively easy to avoid such eavesdroppers by lowering the voice or moving away. Moreover, one can be reasonably sure of whether one will be overheard. But if the state's

position in this case is correct, no movement, no location and no conversation in a "public place" would in any measure be secure from the prying of the government. There would in addition be no ready means for individuals to ascertain when they were being scrutinized and when they were not. That is nothing short of a staggering limitation on personal freedom. We could not be faithful to the principles underlying Article I, section 9 and conclude that such forms of surveillance were not searches.

*Id.* at p. 12.

Even accepting arguendo, the majority's logic regarding the expectation of privacy, I am perplexed as to why a conversation between two nonconsenting persons is entitled to all the protections embodied in the federal amendment while a conversation with one consenting to eavesdropping does not. If the key element is the expectation of privacy, then the consent of one participant is insufficient. Unlike the majority, I fail to see the distinction between having the consent of one participant or none as the polestar in guaranteeing a fundamental right. Furthermore, I cannot accept the majority's conclusion that one who communicates to another does so at the expense of his privacy rights. Implicit in the right to privacy is the right to determine who benefits from your knowledge. Knowledge is as much a possessory right as the right to possess and protect our homes and personal property. An individual then may desire not to expose his inner thoughts or ideals to the public at large which he may not trust, but only to selected individuals. Of course, he takes the risk that a friend may betray him and his confidences, but that risk is one that he individually and knowingly assumes. Under such circumstances, he voluntarily chooses to limit his privacy.

Finally, taking the majority's reasoning to its logical extreme, if there is no difference between directly intercepting oral communications and receiving and recording

information from an informant, then there will be no difference in directly probing and tapping the innermost thoughts of individuals in the future with the advent of more sophisticated electronic equipment. If the ends justify the means and the goal is to prevent criminal activity at the expense of individual liberties, then, under the majority's interpretation, I see no way to prevent intercepting thoughts even before they are orally and publicly communicated.

Accepting the importance of the right to privacy, as the majority must, the issue still becomes whether the governmental intrusion is reasonable, not whether an individual possesses an expectation of privacy. We have specifically rejected the United States Supreme Court's analysis of the legitimacy of privacy as a key element in interpreting Article I, section 8 of this Commonwealth's Constitution. Instead, we have held that our primary concern is the reasonableness of the intrusion. *Commonwealth v. Sell*, *supra*.

In other areas of criminal law we have consistently held that a warrantless search or a search pursuant to a warrant must be based upon probable cause. To ensure an objective determination of whether the intrusion is supported by probable cause, we have required a disinterested judicial officer to review the facts either preliminarily, in the case of a search pursuant to a warrant, or subsequently, in the case of a warrantless search, to determine if sufficient facts were present to establish probable cause that criminal activity was occurring. This neutral determination suffices to protect a person from an unjustifiable intrusion. Under § 5704(2)(ii), however, the legislature has impermissibly taken the "probable cause" determination from the judiciary and given that determination to a law enforcement official who cannot be said to be either neutral or detached. In *Commonwealth v. Johnston*, 515 Pa. 454, 530 A.2d 74 (1987), we specifically rejected the approach now taken by the ma-

jority in balancing the individual and governmental interests to be protected in determining whether a search was reasonable. Instead, we held that a determination that probable cause existed for the search supported a finding that the search was reasonable. Without such a neutral determination the search would be unreasonable.

Based upon the foregoing analysis, I cannot accept the constitutionality of § 5704 of the Act. I am cognizant of the principles that a statute is presumed to be constitutional and that the legislature does not intend to promulgate unconstitutional legislation. 1 Pa.C.S. § 1922(3). However, when a statute so blatantly ignores a liberty entrenched in our body of laws for over 200 years, that presumption must necessarily fall. Unlike the Superior Court's approach in *Commonwealth v. Schaeffer*, — Pa. Super. —, 536 A.2d 354 (1987), I cannot in good conscience redraft the statute to include a requirement so basic to our system of justice to achieve a desired result. See 1 Pa.C.S. § 1921(b). It is clear to me that given the importance of the right to privacy in our jurisprudence, as even acknowledged by the legislature in this Act, I cannot conclude otherwise than that the legislature did not intend for a disinterested objective determination of probable cause prior to intercepting oral communications. See 1 Pa.C.S. § 1921(a). Therefore, I would find Section 5704 unconstitutional and remand this matter to the trial court for a new trial during which the information obtained pursuant to the Act would be suppressed.<sup>1</sup>

Mr. Justice Larsen joins in this dissenting opinion.

<sup>1</sup> President Judge Cirillo of the Superior Court has written a rather lengthy and scholarly opinion on this issue in *Commonwealth v. Schaeffer*, *supra*. Except for his reasoning on the constitutionality of § 5704 of the Act, I note with approval his analysis of the issue and would incorporate his opinion into this one.

SUPREME COURT OF PENNSYLVANIA  
WESTERN DISTRICT

No. 37 W.D. Appeal Docket, 1986

COMMONWEALTH OF PENNSYLVANIA

v.

SCOTT WAYNE BLYSTONE,

Appellant

Appeal from the Judgments of Sentence  
of the Court of Common Pleas of Fayette County,  
Criminal Division, at Nos. 2, 2 1/4, 2 2/4 & 2 3/4 of  
1984, entered on April 17, 1986

Argued: March 9, 1987

Reargued: March 7, 1988

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the convictions of the Court of Common Pleas of Fayette County, Criminal Division, of murder of the first degree, robbery, and criminal conspiracy to commit those offenses are sustained and the sentences of death and ten to twenty years imprisonment are affirmed.

/s/ Irma T. Gardner  
IRMA T. GARDNER  
Deputy Prothonotary

Dated: October 17, 1988

SUPREME COURT OF THE UNITED STATES

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No. 88-6222

SCOTT WAYNE BLYSTONE,  
*Petitioner*

v.

PENNSYLVANIA

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ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Pennsylvania, Western District is granted and is limited to Question II presented by the petition.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 27, 1989